Supreme Court, U.S.
FILED
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

A.A. & M. CARTING SERVICE, INC.; FARMINGDALE CARTING, INC.; NATALE PEPE WASTE CORP.; PGS CARTING CO., INC.; JOSEPH S. CELANO; MARIANNE CELANO; JC INDUSTRIES, INC.; C.B.S. RUBBISH CO., INC.; FARMINGDALE INDUSTRIAL PARK ASSOCIATION; MINERSFUEL COMPANY, INC.; and RESOURCES CONSERVATION CORP.,
Petitioners,

v.

TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2, also known as COMMERCIAL WASTE COLLECTING AND RECYCLING DISTRICT; TOWN BOARD OF THE TOWN OF BABYLON; RICHARD H. SCHAFFER; and BABYLON SOURCE SEPARATION COMMERCIAL, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the market participant doctrine immunizes a municipality from Commerce Clause review when it uses its regulatory power, including the imposition of volume-based disposal fees, to direct all locally-generated waste to a local disposal facility?

2. Whether a municipal plan that utilizes regulatory power, including mandatory volume-based disposal fees, to direct all locally-generated waste to a local disposal facility, constitutes discrimination against and a burden on interstate commerce in violation of the Commerce Clause?

3. Whether a violation of the Commerce Clause constitutes irreparable harm for purposes of obtaining preliminary injunctive relief?

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Pursuant to Supreme Court Rule 29.1, Petitioner Resource Conservation is a wholly-owned subsidiary of Mid-American Waste Systems, Inc. Mid-American is a publicly-traded corporation.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners A.A. & M. Carting, *et al.* respectfully pray that a writ of certiorari issue to review the judgment and

opinion of the United States Court of Appeals for the Second Circuit entered on September 19, 1995.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 66 F.3d 1272 and is reproduced in the Appendix ("Pet. App.") at 1a to 46a. The Second Circuit's order denying Petitioners' petition for rehearing is reproduced at Pet. App. 102a. The unpublished bench opinion of the United States District Court for the Eastern District of New York is reproduced at Pet. App. 47a to 101a. No written order was issued by the district court.

JURISDICTION

The decision of the court of appeals was entered on September 19, 1995. Its order denying petitioners' timely request for rehearing and suggestion for rehearing in banc was entered on November 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in pertinent part: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ."

Pertinent provisions of the Babylon Town Code are reproduced at Pet. App. 105a to 106a.

STATEMENT OF THE CASE

This case raises the same basic issue as that pending in No. 95-782, *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995) (hereinafter "*Smithtown*"), *petition for cert. filed*, 64 U.S.L.W. 3380 (U.S. Nov. 28, 1995)—the validity under the Commerce Clause of a municipal waste management plan that has the design and effect of directing waste to a favored local facility

and precluding its disposal with out-of-state companies. Petitioners here include an out-of-state waste disposal facility that previously received commercial waste from Babylon, a motor carrier engaged in interstate transportation of solid waste, local waste collection companies previously licensed to collect garbage in the town and an association of small businesses that generate waste within the town's commercial garbage district. All have been isolated from the interstate market for waste disposal services as a result of the Town's actions.

For over seven years, the Town of Babylon had a flow control ordinance virtually identical to that invalidated by this Court on Commerce Clause grounds in *C & A Carbone, Inc. v. Clarkstown*, 114 S. Ct. 1677 (1994). As in *Carbone*, that ordinance required all solid waste collected within the community to be disposed of at a designated facility. Moreover, as in *Carbone*, this ordinance was designed to ensure the Town's ability to meet its financial obligations to a privately-operated local incinerator. Specifically, Babylon was contractually obligated both to pay the incinerator operator a fee for operating the incinerator and to deliver an annual minimum of 225,000 tons of garbage to the incinerator. To meet these obligations, the Babylon ordinance required all local garbage haulers to dispose of all waste collected in the Town at the local incinerator and to pay "tipping fees" to the Town for each ton of garbage delivered there. Pet. App. 9a.

Following *Carbone*, Babylon realized that its ordinance also was unconstitutional and looked for a new way to defray its financial commitments to the operator of the incinerator. Pet. App. 9a. The approach that it adopted perpetuates the prior flow control regime.

Under this scheme, the Town first created a "commercial garbage district" within its boundaries and licensed a single private company (the "licensee") to collect all waste generated within this new district pursuant to a

contract with the Town.[1] The contract provides that the licensee may dispose of the waste it collects "free" of charge, provided it does so at the designated local disposal facility. While on the face of the contract the licensee is not prohibited from delivering commercial waste elsewhere, if it does so it must bear the disposal costs itself. Pet. App. 104a. Babylon retains "the right to direct the Contractor to dispose of the waste collected pursuant to this Agreement to any Disposal Site or Materials Processing Facility." Pet. App. 104a.[2]

To pay for this system, including the cost of "free" disposal at the incinerator, businesses and commercial property owners in the new commercial garbage district are assessed a mandatory $1,500 annual fee to cover a monthly "base" amount equal to one and one half cubic yards of waste. For any waste above this modest amount, a volume-based fee is charged. To ensure the flow of waste, and more importantly the fees needed to meet the Town's financial commitments to the facility, town regulations prohibit individual waste generators from disposing of their own waste, either by contracting with an unlicensed collection company or by transporting their own waste, unless a generator can obtain a "special exemption" from the Town on a showing of "exceptional circumstances." Pet. App. 9a-13a.

On February 2, 1995, the district court, recognizing that this scheme was really no different in design and effect than the flow control ordinance struck down in *Carbone*, granted a preliminary injunction against Babylon's implementation of its waste management plan, hold-

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[1] The only exceptions are recyclables and construction and demolition debris, which are of limited commercial significance.

[2] Babylon originally proposed to include an express contractual provision requiring the licensee to dispose of waste at the designated facility. After petitioners filed the complaint for injunctive relief, this provision was dropped from the proposed contract.

ing that petitioners were likely to succeed on the merits of their Commerce Clause claims. Applying *Carbone*'s teaching, the district court concluded that Babylon's waste plan "has the same design as the one in *Carbone*" and, as a result of the mandatory fees, "the effect is . . . to require them to use the town facility." Pet. App. 55a.

The district court rejected petitioners' contention that the deprivation of their constitutional rights under the Commerce Clause was sufficient in itself to constitute irreparable injury and further rejected petitioners' factual claims of irreparable injury arising from their exclusion from the commercial garbage market. The district court concluded, however, that a preliminary injunction was nevertheless warranted in light of the strong likelihood that petitioners would prevail on their constitutional claims. Pet. App. 14a.

On appeal, the Second Circuit reversed, ruling that Babylon's plan did not discriminate against or impose any undue burden on interstate commerce. The Second Circuit took as its lodestar two 90-year-old decisions of this Court that did not address the Commerce Clause at all.[3] Pet. App. 2a-3a, 40a-43a. These two decisions were not even mentioned by the majority in *Carbone*, although they had been heavily relied upon by Clarkstown and its amici.[4]

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[3] *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905).

[4] See No. 92-1402, *C&A Carbone, Inc. v. Town of Clarkstown*, Brief for Respondent at 13, 22, 28-29, 41-44; Brief of Amicus Curiae Town of Smithtown, et al. at 13, 17-19, 24-25; Brief of Amicus Curiae Solid Waste Association of North America, et al. at 7, 19; Brief of Amicus Curiae County of San Diego at 11-12, 16-17, 19, 24; Brief of Amicus Curiae Solid Waste Disposal Authority of the City of Huntsville, Alabama at 8-9, 13; Brief of Amicus Curiae Prince George's County, Md., et al. at 31-32; Amicus Curiae Brief of State of Ohio, et al. at 4-5, 16; Brief of the State of New Jersey as Amicus Curiae at 8, 15; Brief of Amicus Curiae of City of Indianapolis, et al. at 9, 13, 26; Brief of Amicus Curiae of Ogden Projects, Inc., et al. at 6, 20.

It then brushed aside the contractual provision giving Babylon the right to direct the licensee to take waste to a specified site on the ground that Babylon "has not indicated that it wishes to exercise this contractual right." Pet. App. 11a.

The Second Circuit broke down the Town's integrated scheme into three components: the Town's relationship with business and property owners; the Town's relationship with the licensee; and the Town's relationship with the incinerator. Viewing its task as one of "decid[ing] whether each [of the three] components of Babylon's waste system constitutes 'regulation' of commerce and, if so, whether such regulation violates the Commerce Clause," the Second Circuit analyzed each component separately and found that no component by itself ran afoul of the Commerce Clause. Pet. App. 17a.

First, with respect to garbage *collection*, the court found no discrimination against interstate commerce because other than the licensee, the Town prohibited *all* garbage haulers—both in-state and out-of-state—from contracting with local businesses for collection services. Pet. App. 19a. Second, turning to the Town's relationship with the licensee, the court treated the Town's decision to let the licensee dump trash for free as "market participation" in the waste *disposal* market, and thus outside the scope of Commerce Clause scrutiny. The Court reasoned that the Town was simply using as it saw fit the disposal rights that it had "purchased" with the annual fees and volume based fees assessed by it on commercial waste generators. Pet. App. 31a-32a. Finally, the Second Circuit ruled that the Town was a "market participant" in the waste *disposal* market when it purchased disposal rights from the incinerator operator and excluded this activity from Commerce Clause review as well. The Second Circuit confirmed the District Court's conclusion that Babylon's plan created "virtually an irresistible incentive to dispose of waste at the town facility," but concluded that this was

irrelevant because Babylon was free as a market participant to benefit local businesses. Pet. App. 37a. It thereupon "direct[ed] dismissal of the plaintiffs' Commerce Clause claims." Pet. App. 44a.

Finally, the court of appeals refused to set aside the district court's finding that petitioners had failed to make a factual showing of irreparable harm, and ruled that in light of that finding the district court had abused its discretion in granting a preliminary injunction. Pet. App. 44a-45a. Petitioners' principal argument—that the deprivation of their constitutional rights under the Commerce Clause itself constituted irreparable injury—was not even addressed by the court of appeals.

The Second Circuit denied petitioners' timely petition for rehearing and suggestion for rehearing in banc on November 1, 1995. Pet. App. 102a.

REASONS FOR GRANTING THE WRIT

This case is one of several, arising in the aftermath of this Court's decision in *Carbone,* in which courts of appeals have upheld local waste flow plans that replace ordinances of the type invalidated in *Carbone* with regulatory requirements and/or contractual schemes designed to ensure that local waste continues to go to a local disposal facility. To accomplish this result here, the Second Circuit employed a twisted application of the "market participant doctrine" that threatens to undermine dormant Commerce Clause jurisprudence and create an exception that swallows the rule prohibiting discrimination against interstate commerce.

Because of the practical significance of the decision below as a road map for local governments seeking to evade this Court's decision in *Carbone,* and the jurisprudential significance of its misapplication of the market participant doctrine, review by this Court is plainly warranted.

I. EFFORTS BY LOCALITIES TO EVADE THIS COURT'S DECISION IN *CARBONE* MUST BE ADDRESSED

In *Carbone*, this Court squarely held that state or local laws whose "design and effect" is to "hoard solid waste, and the demand to get rid of it, for the benefit of" a local facility unlawfully discriminate against interstate commerce. Rather than comply with that decision, however, far too many local governments have sought ways to evade *Carbone* through a variety of inventive techniques. Unfortunately, decisions such as this case and *Smithtown*, as well as the Third Circuit's decision in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *petition for certiorari pending sub nom. Tri-County Indus. v. County of Mercer* (Jan. 16, 1996) (No. 95-1127), discussed more fully *infra* at 13-14, only encourage their efforts. Review by this Court is thus urgently needed to ensure that *Carbone* is not effectively nullified.[5]

The reluctance of local governments to comply with *Carbone* is perhaps understandable. Flow control originated as a financing device—to ensure that sufficient waste would be delivered to a facility to generate revenues to pay off bonds guaranteed by the local government or to fulfill the government's obligations under a contract with a local disposal company. This is no doubt the reason that at least thirty-three states have expressly granted localities or state agencies the authority to adopt flow

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[5] The same problem occurred with respect to state and local laws attempting to prevent the import of waste from other states. This Court held in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) that such laws discriminate against interstate commerce. Yet it was forced to grant review in three more cases in order to put a stop to local efforts to evade that decision, with the blessing of various lower courts. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 358 (1992); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 346 (1992); *Oregon Waste Sys. v. Department of Envtl. Quality*, 114 S. Ct. 1345 (1994).

control statutes.[6] As the U.S. Environmental Protection Agency has noted, one of the "major factors" affecting the financial risk of a waste disposal project is the availability of a steady supply of waste.[7] And in the free market, waste will move to a facility only if that facility charges competitive prices.

This Court in *Carbone* recognized that, on their own, some facilities may not be competitive and advised localities that if "special financing is necessary to ensure the long-term survival of the designated facility . . . the town may subsidize the facility through general taxes or municipal bonds." *Carbone*, 114 S. Ct. at 1684. But a general tax increase is politically unpopular, and municipal

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[6] Alabama (Ala. Code §§ 22-27-3, 22-27-5); Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. §§ 22A-220A); Delaware (Del. Code Ann. tit. 7, § 6406(31)); Florida (Fla. Stat. Ann. § 403.713); Georgia (Ga. Code Ann. § 12-8-51); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Ann. Stat. § 5/5-1047); Indiana (Ind. Code Ann. §§ 36-9-31-3, 36-9-31-4); Iowa (Iowa Code Ann. § 28G.4); Louisiana (La. Rev. Stat. Ann. § 30:2307(9)); Maine (Me. Rev. Stat. Ann. tit. 38, § 1304-B(2)); Minnesota (Minn. Stat. Ann. § 115A.80); Mississippi (Miss. Code Ann. § 17-17-319); Montana (Mont. Code Ann. § 75-10-112); Nebraska (Neb. Rev. Stat. §§ 13-2026, 13-2033, & 13-2034); New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws ch. 569, at 1072-73); North Carolina (N.C. Gen. Stat. 130A-294); North Dakota (N.D. Cent. Code § 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01(H)(2)); Oklahoma (Okla. Stat. Ann. tit. 27A, § 2-10-901); Oregon (Or. Rev. Stat. § 268.317(3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen. Laws § 23-19-10(40)); South Dakota (S.D. Codified Laws Ann. §§ 34A-16-35, 34A-16-41); Tennessee (Tenn. Code Ann. § 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, §§ 2203a, 2203b); Virginia (Va. Code Ann. § 15.1-28.01); Washington (Wash. Rev. Code §§ 36.58.040, 35.21.120); West Virginia (W. Va. Code § 24-2-1h); Wisconsin (Wis. Stat. § 159.13(3), (11)); Wyoming (Wyo. Stat. § 18-11-102).

[7] *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action (Background Document)* 3.B-2 (Sept. 1988).

bonds may have to be supported by the full faith and credit of the local jurisdiction. Rather than take such steps, localities such as Babylon have instead sought to utilize a variety of regulatory and other schemes to ensure that locally generated waste continues to flow to the favored facilities.

Unfortunately, these efforts have found a receptive ear with certain lower courts, whose decisions now provide a road map to localities eager to evade *Carbone*. Thus, in both *Smithtown* and in the instant case, the Second Circuit upheld municipal plans which repeat the prohibited "effect and design" of the *Carbone* ordinance.[8]

The decision below has two fundamental flaws. First, it elevated the form of Babylon's plan over the substance; and second, it pursued a piecemeal approach to its analysis of the various components of the Town's plan instead of analyzing the plan as a whole.

This Court has repeatedly rejected a form-over-substance approach to Commerce Clause analysis:

> Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects. As the Court declared over 50 years ago: "*The commerce clause forbids discrimination, whether forthright or ingenious.* In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its *practical operation* work discrimination against interstate commerce."

West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2215-16 (1994) (quoting *Best & Co. v. Maxwell*, 311

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[8] In *Carbone*, the Supreme Court, in striking down the Clarkstown ordinance, stated that while the ordinance "may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its practical effect and design." 114 S. Ct. at 1684.

U.S. 454, 455-56 (1940) other citations omitted) (emphasis added). *See also South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 99 n.11 (1984) ("It is the substance of the transaction, rather than the label attached to it, that governs Commerce Clause analysis.").

Second, the Second Circuit ignored this Court's admonition in *West Lynn Creamery,* 114 S. Ct. at 2214-15, that a reviewing court must examine the challenged program "as a whole." The Second Circuit, *without any supporting citation,* described its role in scrutinizing the constitutionality of Babylon's plan as follows:

> In accordance with the Supreme Court's instructions, we proceed to decide whether each component of Babylon's waste management system constitutes "regulation" of commerce, and, if so, whether such regulation violates the Commerce Clause.

Pet. App. 17a. The lower court then proceeded to conduct a separate examination of each component of the system and concluded that each, standing alone, either constituted market participation and was thus not subject to the Commerce Clause, or did not discriminate against or burden interstate commerce.

This Court explicitly rejected this component-by-component approach in *West Lynn Creamery,* where Massachusetts sought to justify a price support program by arguing that each component of the program—a local subsidy and a non-discriminatory tax—was valid. Instead, it required that the whole program be scrutinized:

> [The state] errs in assuming that the constitutionality of the pricing order follows logically from the constitutionality of its component parts . . . .
>
> It is the entire program—not just the contributions to the fund or the distributions from that fund—that simultaneously burdens interstate commerce and discriminates in favor of local producers. The choice of constitutional means—non-discriminatory tax and

> local subsidy—cannot guarantee the constitutionality of the program as a whole.

114 S. Ct. at 2214-15.

In fact, when viewed "as a whole," the prohibited "effect and design" of Babylon's plan is identical to *Carbone*'s invalid ordinance. Both share the same design: to ensure that all waste in fact winds up in the local disposal facility, thereby satisfying the Town's financial obligations to the facility. Both share the same effect: to allow the town to hoard its locally generated waste, to the detriment of out-of-state disposal companies—a result condemned in *Carbone* and the numerous "local processing" cases previously decided by this Court.[9] And, most significantly, both have the same detrimental impact on interstate commerce.

Indeed, a close examination of the schemes adopted by Clarkstown and Babylon exposes their similarity. Both towns, acting under virtually identical New York state enabling statutes, had assumed financial obligations pursuant to a contract with the operator of the local disposal facility. In *Carbone*, the Town of Clarkstown had a put or pay contract with the facility: the Town was required either to provide a fixed volume of waste to the favored local disposal facility, or to pay the facility for any shortfall. Here, the Town has a service contract with the local disposal facility that requires it to pay the facility up front regardless of whether any garbage is processed there. Pet. App. 7a-8a.

To meet these financial commitments, both towns steered locally generated trash to their designated local disposal facilities. Clarkstown did so by an ordinance requiring that all waste in the Town be taken to the local disposal facility. Babylon does so by requiring commercial

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[9] *See Carbone*, 114 S. Ct. at 1682-83 (listing "local processing" cases).

generators of trash to use the collection services of a designated licensee and collecting a mandatory fee, based on volume, covering both collection and disposal services. Compared to *Carbone*, Babylon's arrangement amounts to no more than a change of form—in both cases the municipalities are capturing all locally generated waste to meet their financial commitments to the local disposal facilities.

The pernicious effect of the Second Circuit's "component by component" approach is further demonstrated when this case is viewed in conjunction with *Smithtown*. There the Town had adopted an even more transparent means of evading *Carbone*—a contractual restriction that required all persons licensed to collect waste in the Town to dispose of it at the local facility. Again the Second Circuit carved up the waste plan into "component" parts: "Smithtown is a 'major participant' in two 'discrete, identifiable class[es] of economic activity': waste collection and waste disposal." *Smithtown*, 66 F.3d at 515. The Second Circuit then concluded that Smithtown's actions in each of the two markets was lawful, on separate—and indeed inconsistent—rationales. *Id.*

Nor is the problem limited to the Second Circuit. The Third Circuit also adopted a crabbed interpretation of *Carbone* in *Harvey & Harvey*, when it addressed Commerce Clause challenges to two different municipal "flow control" plans. In addressing the constitutionality of these schemes, the Third Circuit focused on "the process of selecting waste service providers rather than on the effect of the regulation once a provider or providers have been chosen." 68 F.3d at 802. That court concluded that as long as the selection process for the favored facility is open and competitive to in- and out-of-state businesses, there is no Commerce Clause violation. *Id.* The Third Circuit simply grafted this "process" focus onto Commerce Clause analysis in order to avoid *Carbone*'s reach. Indeed, it conceded: "we cannot cite any authority for th[is] sort of

inquiry." *Id.* *Carbone*, of course, never mentions "process"; instead, it stresses that the focus must be on the "design and *effect*" of the challenged scheme. *Carbone*, 114 S. Ct. at 1683 (emphasis added). A vigorous dissent made precisely this point, reasoning that "regardless of the process employed in selecting waste service providers, the effect discriminates against interstate commerce." *Harvey & Harvey*, 68 F.3d at 810.

By sanctioning various techniques to evade *Carbone*, both the Second Circuit and the Third Circuit have issued an invitation to local governments to continue their protectionist practices and to steer waste to local facilities. This invitation will inevitably be accepted by local governments eager to satisfy their financial commitments to disposal facilities without imposing unpopular general taxes or issuing municipal bonds; excluded out-of-state interests will be powerless to stop them. This practical consequence underscores why prompt consideration of this issue by this Court is essential.

II. THE LIMITS OF THE MARKET PARTICIPANT DOCTRINE NEED TO BE CLARIFIED

The Second Circuit upheld the waste flow plans at issue in both this case and *Smithtown* on the basis of the "market participant doctrine." Its interpretation of that doctrine, and the analytical approach that it employed in applying the doctrine in these two cases, have ramifications far beyond the waste flow context. Indeed, when viewed in juxtaposition with other federal and state appellate court decisions, it is apparent that clarification of the market participant doctrine by this Court is urgently needed.

Although it was first adopted by this Court some twenty years ago, in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the market participant doctrine has continued to confuse the lower courts. In the handful of cases in

which this Court has relied on the doctrine to immunize local government activities from Commerce Clause scrutiny, no clear criteria for its application have been articulated, and indeed this Court itself has recognized that the "precise contours of the market-participant doctrine have yet to be established." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. at 93.[10]

At the same time, however, the federal courts of appeals[11]

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[10] Since *Alexandria Scrap*, this Court has upheld state or local activities on the basis of the market participant doctrine in only three cases: *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (dicta); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

[11] *See, e.g., Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595-96 (7th Cir. 1995) (state statute restricting utilities' ability to use non-Illinois coal not protected by the market participant doctrine); *GSW, Inc. v. Long County*, 999 F.2d 1508, 1510-16 (11th Cir. 1993) (county not market participant when it set geographic limitation on source of landfill waste); *J.F. Shea Co. v. City of Chicago*, 992 F.2d 745, 747-49 (7th Cir. 1993) (local business preference rule protected by market participant doctrine); *Big Country Foods, Inc. v. Board of Educ.*, 952 F.2d 1173, 1178 (9th Cir. 1992) (statute giving preference to in-state milk suppliers upheld under market participant doctrine); *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903, 909-12 (3d Cir. 1990) (regulation requiring American-made steel products for public works projects protected by the market participant doctrine), *cert. denied*, 501 U.S. 1212 (1991); *Swin Resources Sys., Inc. v. Lycoming County*, 883 F.2d 245, 248-51 (3d Cir. 1989) (county a market participant when it charged lower rate to dispose of local waste), *cert. denied*, 493 U.S. 1077 (1990); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1056-58 (9th Cir. 1987) (setting of franchise fees for easements under public streets did not fall within market participant doctrine), *cert. denied*, 487 U.S. 1235 (1988); *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 495-96 (7th Cir. 1984) (state statute requiring state and local governments to hire local workers not protected by market participant doctrine); *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342 (9th Cir. 1984) (state not acting as market participant when it regulated rents of state-owned tidelands and submerged lands), *aff'd*, 471 U.S. 81 (1985); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982)

and state appellate courts [12] are increasingly grappling with the doctrine, as state and local governments seize upon it as a convenient means of escaping Commerce Clause review of activities designed to benefit local industries at the expense of out-of-state competitors. Courts of appeals throughout the country have expressed their uncertainty as to the appropriate extent of the doctrine. Thus, the Eleventh Circuit in *GSW, Inc. v. Long County*, 999 F.2d at 1511, pointedly commented that the "market participant doctrine . . . is a relatively new and difficult area of the Supreme Court's jurisprudence." Similarly, the Ninth Circuit, in *Big Country Foods, Inc. v.*

(state statute excluding out-of-state radioactive waste not protected by market participant doctrine), *cert. denied*, 461 U.S. 913 (1983); *Smith v. Georgia Dept. of Agriculture*, 630 F.2d 1081, 1083 (5th Cir. 1980) (regulation assigning non-residents to inferior sales locations in state-owned Farmers Market not protected by market participant doctrine), *cert. denied*, 452 U.S. 910 (1981).

[12] *See, e.g., Verzi v. Baltimore County*, 333 Md. 411, 423, 635 A.2d 967, 973 (1994) (county did not function as market participant when issuing towing licenses and deciding which licensees may tow which vehicles); *Board of Trustees of Employees' Retirement Sys. v. Baltimore City*, 317 Md. 72, 131, 137, 562 A.2d 720, 749-52 (1989) (ordinances requiring that city pension funds divest their holdings in companies doing business in South Africa fell within market participant doctrine), *cert. denied*, 493 U.S. 1093 (1990); *Carll v. South Carolina Jobs-Economic Dev. Auth.*, 284 S.C. 438, 327 S.E.2d 331, 337 (1985) (statute providing for capital and management assistance to eligible South Carolina businesses protected by the market participant doctrine); *Gary Concrete Prods., Inc. v. Riley*, 285 S.C. 498, 331 S.E. 2d 335 (1985) (statute giving preference to citizens bidding for the supply of reinforced concrete pipe to the state fell within the market participant exception); *County Comm'rs of Charles County v. Stevens*, 299 Md. 203, 214-16, 473 A.2d 12, 18-19 (1984) (regulation barring disposal of trash collected outside county at county-owned landfill upheld under the market participant doctrine); *Archer Daniels Midland Co. v. Minnesota*, 315 N.W.2d 597, 599-600 (Minn. 1982) (statute reducing tax for gasohol containing alcohol distilled within Minnesota did not fall within market participant exception).

Board of Educ., 952 F.2d at 1178, stated that the "line between state market participation and state regulation is a fuzzy one that has perplexed courts and commentators alike." And the Third Circuit, in *Swin Resource Sup., Inc. v. Lycoming County*, 883 F.2d at 249, noted that "[a]pplication of the distinction between 'market participant' and 'market regulator' has . . . occasioned considerable dispute. . . ." [13]

The explosion of market participant claims has accelerated in the wake of this Court's decision in *Carbone*, as local governments that previously relied on flow control ordinances similar to those invalidated in *Carbone* scramble to find a way to continue to direct trash to a local facility without subjecting themselves to Commerce Clause scrutiny. The same fundamental issue regarding the limits of the market participant doctrine in the context of a local waste management scheme is presently pending before this Court in *Smithtown*, where the Second Circuit utilized the doctrine to uphold contractual restrictions designed to continue to direct trash to the local facility. Federal district courts also have struggled with assertions of market participant status to shield restrictions on the free interstate movement of solid waste.[14]

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[13] Legal commentators also have noted the need for clarification of the market participant doctrine. *See* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 405 (1989); Richard H. Seamon, Note, *The Market Participant Test in Dormant Commerce Clause Analysis—Protecting Protectionism?*, 1985 Duke L.J. 697, 721.

[14] *See Southcentral Pennsylvania Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F. Supp. 935, 940-41 (M.D. Pa. 1994) (market participant exception did not apply to solid waste management authority's waste control flow policy); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566, 1572-73 (M.D. Ala. 1993) (market participant exception did not apply to waste flow control ordinances), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204, 1211-12 (D.R.I. 1987) (statute

Review by this Court is urgently needed to clarify the limits on the market participant doctrine. In the absence of guidance from the Court, the lower courts are being forced to shape this doctrine on their own, on an ad hoc basis, with no consistent criteria.

Moreover, as the decision of the Second Circuit in this case and in *Smithtown* reveal, some courts are applying the doctrine without regard to the Commerce Clause goal of ensuring the existence of a national free market in goods and services. The fundamental underpinning of the doctrine is that a state or local government is entitled to "participate" in the free market just as any private entity might do—and that when it does so, it should be treated the same as a private participant. *See Reeves*, 447 U.S. at 439 (a state entering the marketplace is "burdened with the same restrictions imposed on private market participants" and "should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause").

The Second Circuit in this case and *Smithtown* ignored this fundamental point. Rather than simply permitting a local government to participate in the marketplace alongside private businesses, it has used the doctrine to enable a town to do something no private business could do—to create a governmental monopoly through the use of its regulatory power, and then avoid the Commerce Clause by characterizing itself as a mere "participant" in the newly-monopolized "market." This result is a perversion of the market participant doctrine that threatens to undermine the fundamental fabric of dormant Commerce Clause jurisprudence.

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prohibiting deposit of out-of-state waste in state-operated landfill protected by the market participant exception); *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 131 (D. Or., 1986) (ordinance restricting use of landfill by nonresidents protected by market participant exception), *aff'd*, 820 F.2d 1482 (9th Cir. 1987).

A review of the cases in which this Court has recognized the market participant doctrine—*Reeves, Alexandria Scrap, White* and *Wyoming*—demonstrates that the Second Circuit has expanded the doctrine beyond recognition. This Court's prior cases all involved a local government's right to deal voluntarily with whom it wanted, *not* to *compel* third parties to deal only with the local government. Thus, *Reeves* concluded that South Dakota could sell cement it manufactured only to South Dakota residents. The decision nowhere suggests that South Dakota could require its residents to buy only from it. Similarly, *Alexandria Scrap* merely held that, in buying scrap, Maryland could apply more lenient paperwork standards to local residents. It did not hold that Maryland could compel local dealers to sell only to the State. *White* allowed the City of Boston to contract only with contractors that met standards the City thought important; it did not allow Boston to compel the contractors to work for the City. And finally, *Wyoming,* in dicta, indicated an Oklahoma agency purchasing coal could give a preference to local producers; it did not allow Oklahoma to compel those producers to sell only to the State.

In its seminal decision in *Alexandria Scrap*, 426 U.S. at 806, this Court emphasized that when Maryland entered the scrap auto market it did not interfere with the "natural functioning of the interstate market either through prohibition or through burdensome regulation." Here, in contrast, Babylon has not only "interfered" in the private market—it has used its regulatory power to destroy that market entirely and create a monopoly. As the district court in *Waste Recycling* noted, in a decision affirmed by the Eleventh Circuit, when a municipal waste plan includes "measures that are clearly and uniquely regulatory and governmental in nature," which no "private participants in the market place could implement," the town plainly cannot avail itself of the haven of the market participant doctrine. *Waste Recycling,* 814 F. Supp. at 1573.

The Ninth Circuit has recognized that the market participant doctrine cannot apply where a local government is a monopolist rather than a competitor in the marketplace. In *Western Oil & Gas Ass'n v. Cory*, 726 F.2d at 1342-43, that court declined to apply the "market participant" exception to California's lease of its tidelands on the ground that the California Lands Commission had "a complete monopoly over the sites" being leased. The Ninth Circuit correctly recognized that only a "state's participation in the market place *as a competitor* [is] to be shielded from the Commerce Clause." (emphasis added). Babylon's monopoly status alone should negate any claim of market participant status.[15]

In short, the Second Circuit in this case and in *Smithtown* has extended the market participant doctrine far beyond any point ever recognized by this Court. To prevent the market participant doctrine from wholly distorting general Commerce Clause jurisprudence, this Court should grant certiorari in order to clarify the appropriate limits of the doctrine.

III. THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER A VIOLATION OF THE COMMERCE CLAUSE CONSTITUTES IRREPARABLE HARM, AND THEREFORE WARRANTS INJUNCTIVE RELIEF

This case also offers an ideal opportunity for the Court to clarify an important constitutional issue upon which there is disarray among the lower courts—whether a deprivation of rights under the Commerce Clause constitutes

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[15] In addition, unlike this Court's previous "market participant" cases, Babylon does not rely exclusively on tax dollars to pay for the services of its contractors, but uses a mix of special assessments and volume-based fees that it compels the commercial generators of waste to pay. In *White*, this Court carefully limited its market participant holding to those projects on which "the city expended only its own funds." *White*, 460 U.S. at 214-15.

irreparable injury.[16] In the instant case, the Second Circuit affirmed the district court's finding that a Commerce Clause violation does not constitute irreparable harm where the resulting injury was economic in nature. Pet. App. 45a.

In *Elrod v. Burns*, 427 U.S. 347, 373 (1976), this Court held that the deprivation of rights under the First Amendment, for even minimal periods of time, unquestionably constitutes irreparable injury. However, except in the context of takings,[17] the Court has never addressed this issue in the context of rights protected by other provisions of the Constitution. In the absence of guidance from this Court, the lower courts are applying inconsistent standards with respect to this important issue.

Some lower courts have held that the deprivation of a constitutional right constitutes irreparable injury even if the injury is financial. *See, e.g., G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1078-79 (6th Cir. 1994) (First Amendment); *West Indian Co. v. Government of the Virgin Islands*, 643 F. Supp. 869, 882 (D.V.I. 1986) (Contracts Clause), *aff'd*, 812 F.2d 134 (3d Cir. 1987); *Container Corp. v. Mecklenburg County*, No. 3:92CV-154-MU, 1992 U.S. Dist. LEXIS 21,942, at *12 (W.D.N.C. June 19, 1992) (Commerce Clause);

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[16] One of the requirements for obtaining injunctive relief is a showing that without such relief the plaintiff will suffer irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 88 (1974).

[17] The Court has held that equitable relief is not available to enjoin an alleged taking of private property for a public use, when a suit for compensation can be brought against the sovereign subsequent to the taking. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). In so holding, the Court has noted that the Fifth Amendment does not require that compensation precede the taking. *Id.* at 1016. Thus, where compensation is available, there is no constitutional violation as a matter of law. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949). This is entirely different from a violation of the Commerce Clause, which is unconstitutional regardless of whether compensation is available.

Allen v. Minnesota, 867 F. Supp. 853, 859 (D. Minn. 1994) (Commerce and Contracts Clauses); *Government Suppliers Consolidating Servs., Inc. v. Bayh,* 734 F. Supp. 853, 864 (S.D. Ind. 1990) (Commerce Clause).

Other lower courts, as in the instant case, have held that where the injury resulting from a constitutional injury is monetary in nature, there is no irreparable harm. *See, e.g., Public Serv. Co. v. Town of W. Newbury,* 835 F.2d 380, 382 (1st Cir. 1987) (procedural due process); *Hohe v. Casey,* 868 F.2d 69, 72 (3d Cir.) (First Amendment), *cert. denied,* 493 U.S. 848 (1989); *Amwest Sur. Ins. Co. v. Reno,* C.A. No. 93-56625, 1995 U.S. App. LEXIS 9093, at *3 n.1 (9th Cir. April 18, 1995) (due process); *Northeastern Florida Chapter Ass'n Gen. Contractors v. Jacksonville,* 896 F.2d 1283, 1285 (11th Cir. 1990) (equal protection), *rev'd on other grounds,* 113 S. Ct. 2297 (1993); *Christ Gatzonis Elect. Contractor, Inc. v. New York City Sch. Constr. Auth.,* No. CV-93-2418 (CPS), 1993 U.S. Dist. LEXIS 9147, at *13 (E.D.N.Y. July 2, 1993) (due process).

This divergence stems from two fundamentally different views of the nature of the rights protected by constitutional provisions such as the Commerce Clause. Those courts that have refused to recognize the deprivation of such rights as irreparable injury have sought to distinguish *Elrod* on the theory that, as long as the effect of the deprivation is monetary, an award of damages is sufficient. In contrast, those courts that have treated such deprivations as irreparable injury have taken the view that there is a dimension to a deprivation of rights under the Constitution that can never be fully rectified by damages.

We believe the latter view is plainly correct. This Court has held that the freedom to participate in interstate trade free from restrictive state regulation is one of the basic liberties of citizenship. *Dennis v. Higgins,* 498 U.S. 439, 448 (1991). "To carry on interstate commerce is not a

franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States . . ." *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891). The fact that this right involves an economic freedom does not diminish its importance. *Cf. Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1991) ("the dichotomy between personal liberties and property rights is a false one"). The constitutional right to engage in interstate commerce is an intangible basic liberty, like other constitutional rights such as free speech, whose value cannot be quantified. *See, e.g., Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one . . . . Assertion of a First Amendment right is another.").

Moreover, unless violations of the Commerce Clause can be readily enjoined, this important constitutional right will be sapped of its meaning. Injunctions are a primary means of enforcing the Commerce Clause. *See, e.g., Dennis v. Higgins*, 498 U.S. at 447; *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 31 (1990); *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 795 (4th Cir. 1991); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 569 (6th Cir. 1982). Yet most Commerce Clause violations result in injury to the plaintiff that is monetary in nature. When courts refuse to find irreparable harm from Commerce Clause violations, unconstitutional barriers to interstate trade remain in place while lengthy legal challenges unfold (or indefinitely when costly legal challenges may be abandoned). This hurts not only the parties who have challenged the statute, but all other participants in the affected market, as well as consumers who benefit from unrestricted market competition.

This Court has long recognized the importance of the Commerce Clause in limiting states' ability to restrict interstate commerce, and in protecting the national "common market." *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977). To ensure that this protection is not diluted by refusals of lower courts to recognize the irreparable harm resulting from Commerce Clause violations, the Court should grant certiorari to resolve this important issue.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1818, 1814—August Term, 1994

(Argued: April 12, 1995 Decided: September 19, 1995)

Docket Nos. 95-7129, 7131

USA RECYCLING, INC.; FRIENDLY CARTING, INC.; JOSEPH CARIONE; ANGELO CARIONE; JEAN I. CARIONE; LOUIS CARIONE; and CARL R. FUCCI,

Plaintiffs-Appellees,

—v.—

TOWN OF BABYLON; TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2; TOWN BOARD OF THE TOWN OF BABYLON; RICHARD H. SCHAFFER, Supervisor; FRANCINE V. BROWN, Councilwoman; PATRICK HAUGEN, Councilman; ROBERT KAUFOLD, Councilman; ANTHONY TAFURI, Councilman; and BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

Defendants-Appellants.

A. A. & M. CARTING SERVICE, INC.; FARMINGDALE CARTING SERVICE, INC.; NATALE PEPE WASTE CORP.; PGS CARTING CO., INC.; JOSEPH S. CELANO; MARIANNE CELANO; JC INDUSTRIES, INC.; C.B.S. RUBBISH CO., INC.; FARMINGDALE INDUSTRIAL PARK ASSOCIATION; MINERSFUEL COMPANY, INC.; RESOURCE CONSERVATION CORP.,

Plaintiffs-Appellees,

—v.—

TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2, also known as Commercial Waste Collecting and Recycling District; TOWN BOARD OF THE TOWN OF BABYLON; RICHARD H. SCHAFER; BABYLON SOURCE SEPARATION COMMERCIAL, INC.,
Defendants-Appellants.

Before:

NEWMAN, *Chief Judge*,
VAN GRAAFEILAND and CABRANES, *Circuit Judges*.

JOSÉ A. CABRANES, *Circuit Judge*:

For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States. At their option, cities may provide garbage pick-up to their citizens directly (that is, through town employees or an independent contractor), or they may rely on a closely regulated private market to provide those services. In 1905, the Supreme Court turned away two challenges, brought on takings and due process grounds, to city ordinances in San Francisco and Detroit that gave a single scavenger firm the exclusive right to collect and dispose of city garbage. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905). Although in neither of these cases did the Court address whether the municipal waste systems comported with the Commerce Clause, we squarely face that question today.

The Town of Babylon, New York, has elected to take over the local commercial garbage market. Rather than assemble a municipal waste disposal bureaucracy and purchase directly the necessary equipment, the Town has hired one private company to pick up all commercial

garbage, and another to operate an incinerator where that garbage is burned. Businesses and commercial property owners finance this system by paying the Town flat property taxes and user fees tied to the amount of garbage they generate. No private companies, local or out-of-state, may collect commercial garbage in Babylon.

The plaintiffs in these consolidated cases argue that the Supreme Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), has stripped local governments of their long-settled authority to collect and dispose of town garbage. In *Carbone*, the Supreme Court struck down a municipal ordinance that required private garbage haulers to process all town garbage at a single, privately owned local transfer station. Likewise, the present plaintiffs argue, Babylon has in effect created monopolies in the waste collection and disposal markets by taking over both markets and then hiring independent contractors to provide services on the Town's behalf. This system, they contend, discriminates against interstate commerce and therefore violates the Commerce Clause.

We disagree. Babylon's waste management plan, which so closely resembles those approved by the Supreme Court in *California Reduction* and *Gardner*, neither discriminates against, nor imposes any incidental burdens on, interstate commerce. In reaching that conclusion, we reject the plaintiffs' contention that the *Carbone* decision fashioned from the "dormant" Commerce Clause a new, and unprecedentedly sweeping, limitation on local governmental authority to provide basic sanitation services to local residents and businesses, on an exclusive basis and financed by tax dollars. Such a limitation, to borrow the words of the Supreme Court, "would interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and

distributing governmental largesse. A healthy regard for federalism and good government renders us reluctant to risk these results." *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (citation omitted).

The United States District Court for the Eastern District of New York (Thomas C. Platt, *Chief Judge*) entered a preliminary injunction against the Town of Babylon's implementation of its waste management plan. The court held that plaintiffs in these consolidated cases, *USA Recycling* and *A. A. & M. Carting*, had demonstrated that their challenge to the Town's system was virtually certain to succeed in light of the Supreme Court's recent decision in *Carbone*, 114 S. Ct. at 1682-84. We find that plaintiffs have failed to demonstrate a likelihood of success on the merits, because Babylon's system does not violate the "dormant" Commerce Clause. The district court also erred by granting injunctive relief despite its explicit finding that plaintiffs will not suffer irreparable harm from implementation of Babylon's new waste management system. Because plaintiffs have not made the requisite showings for preliminary injunctive relief, we reverse.

I. FACTS

At the heart of the dispute is the relationship between the Town of Babylon, an incinerator built in Babylon at the behest of the Town ("Incinerator"), and a private garbage hauler hired by the Town (Babylon Source Separation Commercial, Inc., or "BSSCI"). First, we describe the circumstances surrounding the construction and operation of the Incinerator. Second, we describe the town's creation of a commercial garbage district in the wake of the Supreme Court's decision in *Carbone*. Three aspects of Babylon's waste management plan merit special attention. First, the Town has licensed and hired BSSCI to collect all garbage within the district and has refused to renew the licenses of any other private haulers to collect garbage pursuant to individual contracts with

town businesses. Second, the Town permits BSSCI to dispose of town waste at no charge at the Incinerator. Third, the Town finances its commercial garbage collection and disposal system by charging a flat $1500 benefit assessment to commercial property owners, plus a schedule of user fees to individual businesses for garbage they generate beyond a fixed base amount. The facts set forth below are not in dispute.

A. *The Babylon Incinerator*

In the Long Island Landfill Law of 1983,[1] the New York Legislature set deadlines for Babylon and neighboring towns to shut down their municipal dumps, which were contaminating the aquifer that serves most of Long Island. Because closing its landfill would leave Babylon with a shortage of garbage disposal options, the town began to consider building a garbage incinerator. This choice was consistent with the State of New York's articulated policy preference for incinerators (or "resource recovery facilities," as they are also known) over landfills, because "trash-to-ash" facilities reduce the volume of solid waste, put garbage to productive use by generating electricity, and were deemed to be less harmful to the environment. *See* N.Y. ENVTL. CONSERV. LAW § 27-0106 (McKinney Supp. 1995).[2] To promote its hierarchy

[1] 1983 N.Y. Laws 299 (codified at N.Y. ENVTL. CONSERV. LAW § 27-0704 (McKinney 1984)). The Long Island Landfill Law phased out the practice of landfilling raw garbage, prohibited development of new landfills in deep flow groundwater recharge zones, and designated resource recovery, incineration, or composting as the preferred alternatives for disposal of municipal solid waste.

[2] Section 27-0106 provides as follows:

In the interest of public health, safety and welfare and in order to conserve energy and natural resources, the state of New York, in enacting this section, establishes as its policy that:

1. The following are the solid waste management priorities in this state:

(a) first, to reduce the amount of solid waste generated;

of recycling and disposal preferences, New York created a statutory framework that enables towns to contract with private companies to build and operate incinerators and other solid waste management facilities. N.Y. GEN. MUN. LAW § 120-w (McKinney 1986 & Supp. 1994). The State Legislature also passed a law specifically authorizing Babylon to enter into contracts to build a garbage incinerator. 1985 N.Y. Laws 478 § 4(1).

With state approval (if not encouragement) in hand, and in accordance with the bidding procedure detailed in New York General Municipal Law § 120-w(4)(e) (McKinney 1986),[3] Babylon solicited proposals from

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(b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;

(c) third, to recover, in an environmentally acceptable manner, energy from solid waste that can not be economically and technically reused or recycled; and

(d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department.

2. State government must make an essential contribution to the development and implementation of environmentally, economically and technically viable solid waste management programs through fulfilling its responsibilities to provide programs which promote waste reduction and the expansion of markets for recovered materials, clearly articulated, responsive and consistently applied regulatory structures, and a full range of technical assistance to local governments. A state-local partnership, in which the basic responsibility for the planning and operation of solid waste management facilities remains with local governments and the state provides necessary guidance and assistance, must be forged.

3. This policy, after consideration of economic and technical feasibility, shall guide the solid waste management programs and decisions of the department and other state agencies and authorities.

[3] New York General Municipal Law § 120-w(4)(e) (McKinney 1986) sets forth a detailed bidding process for such contracts, in-

more than sixty-nine companies in eighteen states and Canada to construct and operate the Incinerator. Out of the five companies that submitted bids, Ogden Martin Systems, Inc. ("Ogden") was awarded the contract. Ogden is a New Jersey corporation with a Delaware parent.

To finance construction of the Incincerator, the Town of Babylon Industrial Development Agency (the "Agency"), a "public benefit corporation" created under New York law and controlled by the Town, issued $88.9 million in tax-exempt bonds.[4] The land on which the Incinerator was built is owned by the Town, leased to the Agency, and subleased to Ogden. The Incinerator itself is owned by the Agency and leased to Ogden, which operates the facility.

Under a 1985 Service Agreement between Babylon and Ogden (the "Agreement"), the Town has an unconditional obligation to pay Ogden a Service Fee for oper-

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dicating what information must be included in bid proposals, requiring notice and comment on the town's request for proposals, and establishing guidelines for evaluating submitted bids.

[4] *See* N.Y. GEN. MUN. LAW §§ 850-888 (McKinney 1986 & Supp. 1994) (describing purpose, organization, and general powers of industrial development agencies); *id.* § 907-a (McKinney 1986) (establishing Babylon IDA). Under New York law, the purposes of an industrial development agency

> shall be to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing industrial, manufacturing, warehousing, commercial, research and recreation facilities including industrial pollution control facilities, educational or cultural facilities, railroad facilities and horse racing facilities and thereby advance the job opportunities, health, general prosperity and economic welfare of the people of the state of New York and to improve their recreation opportunities, prosperity and standard of living . . . .

Id. § 858. The Agency's governing board is appointed by the Babylon Town Board, and each member "serve[s] at the pleasure of the appointing authority." *Id.* § 856(2).

ating the Incinerator, regardless of whether any garbage is processed there. Through the Service Fee, Babylon pays for debt service on the bonds, operation and maintenance expenses, and various pass-through costs including trustee fees, payments in lieu of taxes, and the cost of transporting and disposing of ash. Under the Agreement, the Town holds exclusive rights to accept garbage for disposal at the Incinerator, and to set and collect fees for such disposal. Although Ogden controls the day-to-day operations of the Incinerator, the company is required to process whatever garbage the Town accepts for disposal. The Agreement requires Babylon to deliver a minimum of 225,000 tons of garbage each year to the Incinerator.

B. *Babylon's Pre-*Carbone *Garbage Collection and Disposal System*

In 1987, to ensure the financial viability of its Incinerator, the Town passed a flow control ordinance that required all solid waste collected within Babylon to be disposed of at a location designated by the Town. BABYLON CODE § 133-40(A) (1991).[5] Babylon designated its

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[5] The New York State Legislature specifically authorized Babylon to enact such a flow control ordinance.

> [T]he town of Babylon is authorized to adopt and amend a local law to be known as the solid waste management law. Such law shall provide for the management on a town-wide basis of all solid waste generated within the town of Babylon. . . .
>
> § 2. It is hereby declared to be the policy of the state of New York with respect to the collection, transportation, delivery, storage, processing and disposal of solid waste in the town of Babylon, in the county of Suffolk, to displace competition with regulation or monopoly public service. In furtherance of this policy, the town of Babylon is hereby authorized to adopt a local law (1) to exclusively control all solid waste and all energy and materials derived therefrom, including without limitation the collection, transportation and delivery of solid waste to a designated resource recovery facility or facilities

Incinerator as the only permissible disposal site, and required garbage haulers to pay "tipping fees" to the Town for each ton of garbage delivered there. The revenues from these fees offset some of Babylon's costs under its Agreement with Ogden.

In 1994, however, the Supreme Court struck down a similar flow control ordinance enacted by another New York municipality that had required the processing of all solid waste in town at a local, privately owned transfer station. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994). In light of that decision, Babylon determined that it should no longer enforce its own flow control ordinance, and it looked for a new way to finance its Incinerator.

C. *The Commercial Garbage Improvement District*

In response to the *Carbone* decision, Babylon decided to create Commercial Garbage Collection District No. 2 (the "District"), covering most commercial real estate in town.[6] Uniform municipal collection and disposal of

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within the town of Babylon for storage or processing or for any other disposition or handling; and (2) to provide for the establishment and collection from time to time of charges as compensation for the service of disposing or handling of such solid waste, all in order to assure a regular solid waste collection and disposal or handling service for the people of the town of Babylon.

1985 N.Y. Laws 478, §§ 1-2.

[6] The Town described the extent of the District in its Final Request for Proposals for commercial waste collection and recycling services:

> The Commercial Garbage District encompasses the entire geographic area of the Town of Babylon, and includes all parcels not included in the Residential Solid Waste District (all improved residential parcels, 3 families or less) and *excluding* the Incorporated Villages of Amityville, Babylon and Lindenhurst; all vacant residential land; all land (improved and unimproved) owned by the United States Government,

waste generated in the District was designed to replace the multitude of contracts between individual commercial garbage generators and the seventeen haulers licensed to collect commercial waste in Babylon.[7] Based on various cost surveys and a competitive bidding procedure pursuant to N.Y. General Municipal Law § 120-w(4)(e) (McKinney 1986), the Town concluded that it could provide better garbage service to commercial property at an overall savings of $7 million to $8 million per year to town consumers.

Based on the bids submitted, the Town entered into a five-year Service Agreement with Babylon Source Separation Commercial, Inc. ("BSSCI") to provide garbage hauling services to all improved commercial property within the District. Under the Service Agreement, the Town agreed to grant BSSCI an exclusive license to collect commercial garbage within the District.[8] Each month,

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State, County, Town and Villages; but *not* schools, fire, ambulance, water and library districts. Within the geographic limits of the unincorporated Town of Babylon, the Town classification of property in June 1994 showed fewer than 7,000 parcels which would comprise the Commercial Garbage District.

Final Request for Proposals at 3-4.

[7] In 1986, the Town created a Residential Garbage Improvement Area (the "Residential District") to provide municipal garbage collection and disposal services to all town residents, pursuant to New York Town Law §§ 54, 198 (McKinney 1965 & Supp. 1986). The Residential District consists of the unincorporated area of the Town outside the Villages of Amityville, Babylon, and Lindenhurst, and outside any previously existing refuse and garbage districts. In December 1987, after another competitive bidding process pursuant to New York General Municipal Law § 120-w (4)(e) (McKinney 1986), the Town contracted with Babylon Source Separation, Inc., to collect residential refuse and to provide recycling services in the Residential District. For reasons that are not clear, the plaintiffs do not challenge the creation of the Residential District.

[8] The Town would grant BSSCI the only Class 2 license, which authorizes a hauler to collect and transport all wastes, except con-

the Town must pay BSSCI a base fee of $22.75 per week for basic service to each parcel, plus additional fees for collection of garbage above the base amount.

The Service Agreement permits BSSCI to dispose of up to 96,000 tons of garbage per year at the Incinerator and unlimited amounts of recyclable material at the town recycling facility, all at no charge. If BSSCI dumps more than 96,000 tons at the Incinerator, it is obliged to "pay the prevailing tipping fee to the Town at the time of such delivery." BSSCI has the option to deliver commercial refuse elsewhere, but it must bear those disposal costs itself. Although Babylon retains the right to direct BSSCI to deliver the contract waste to a particular disposal site, in which case the Town is responsible for paying any disposal fees, the Town has not indicated that it wishes to exercise this contractual right.

To finance the provision of collection and disposal services in the District, the Town imposed a $1500 annual benefit assessment against each improved parcel of commercial property within the District. All such parcels are entitled to "basic service" from BSSCI, defined as weekly collection of one cubic yard of commercial refuse and one-half cubic yard of recyclables. The property owner may allocate this basic service to one commercial establishment per parcel. Other businesses on a parcel, and those businesses requiring more than basic service, must pay a user fee for each additional cubic yard of garbage.

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struction and demolition debris, within the District. Such a license can be granted only to a carter that has a contract with the Town. Babylon Town Code § 133-14(B) (1995).

Other carters, including plaintiffs, are still eligible to apply for Class 1 and 3 licenses. A Class 1 license authorizes a hauler to collect and transport nonrecyclable waste outside an improvement district, and to collect and transport recyclable waste from the improvement district only "if properly authorized by the property owner." § 133-14(A). A Class 3 license authorizes a hauler to collect and transport construction and demolition debris anywhere in the Town. § 133-14(C).

If a business cannot agree with BSSCI as to how much extra service is needed, a contract monitor appointed by the Town will determine the appropriate service level that the business must receive.

D. *Proceedings in the District Court*

In mid-December 1994, plaintiffs filed the present actions in the United States District Court for the Eastern District of New York, seeking to prevent Babylon from implementing its contract with BSSCI to provide collection and disposal services in the District, and from failing to renew the plaintiffs' existing licenses to collect garbage on a town-wide basis. The plaintiffs in *USA Recycling, Inc. v. Town of Babylon* (No. 95-7129) include a commercial solid waste management recycling facility, a garbage collection company that is currently licensed to collect garbage in Babylon, several individuals who own commercial property within the District, and an individual who owns a business located in the District (the "USA Recycling plaintiffs"). The plaintiffs in *A.A. & M. Carting Service, Inc. v. Town of Babylon, New York, Commercial Garbage District No. 2* (No. 95-7131) are an out-of-state waste disposal facility, a motor carrier engaged in interstate transportation of solid waste, five local waste collection companies currently licensed to collect garbage in Babylon, and an association of small businesses that generate waste within the District (the "A. A. & M. Carting plaintiffs").

Plaintiffs claim primarily that the Town's plan to collect and dispose of commercial garbage violates the so-called "dormant" Commerce Clause of the United States Constitution, which limits the states' ability to regulate interstate commerce absent congressional authorization. Specifically, they argue that the exclusion of all private garbage haulers from the commercial garbage collection market, the Town's decision to let its hired garbage hauler dispose of garbage at no charge at the Babylon Incinerator, and the user fees and benefit assessments

charged to property owners and businesses within the District add up to a system that impermissibly discriminates against interstate commerce in the waste collection and disposal markets.

On December 30, 1994, the district court held a hearing on a motion for a preliminary injunction in *USA Recycling*, and entered an order applicable to both of the present cases on January 5, 1995. That order denied all pending motions for injunctive relief without prejudice to renewal, but directed the Town to maintain the status quo and to recognize the existing licenses of collection companies pending amendment of the Town Code. Babylon and BSSCI initially filed an appeal and sought an emergency stay of that order from this Court, but then withdrew their appeal.

On January 10, 1955, Babylon amended its Town Code to implement the new plan.[9] One new provision of the Town Code effectuates the exclusive collection provision of the BSSCI Service Agreement: only BSSCI, as the sole collector that has entered into a contract with the Town, is eligible for a license to collect nonrecyclable garbage generated within Babylon's commercial garbage district. Local Law No. 2 of 1995 (to be codified at BABYLON CODE § 133-14(B)). Other provisions make it illegal for an individual commercial waste generator to dispose of its own waste, either by contracting with a garbage hauler that lacks a Town license, or by transporting its own waste without a "special exemption" from the Town Board upon a showing of "exceptional circumstances." Local Law No. 2 of 1995 (to be codified at BABYLON CODE §§ 133-11(B)(3), 133-37). Plaintiffs in both actions amended their complaints and renewed their motions for preliminary injunctive relief.

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[9] It appears from the record that the Town, at the direction of the district court, has refrained from filing these amendments with the New York Secretary of State, a ministerial act required for the changes to take effect. *See* N.Y. MUN. HOME RULE LAW § 27(3) (McKinney 1994).

On February 2, 1995, the district court granted those motions in a consolidated ruling. Guided by the Supreme Court's decision in *Carbone*, the court determined that the plaintiffs' challenge to the Babylon waste management system was likely to succeed on the merits. The court stated that the Service Agreement "gave BSSCI not only a powerful, but virtually an irresistible incentive to dispose of the waste at the town facility," and thus hoarded the local demand for waste collection and disposal services for the benefit of BSSCI and the Incinerator. As a result, the court concluded that the amended Babylon ordinance had the same discriminatory effect on interstate commerce as the ordinance struck down in *Carbone*. Despite its explicit finding that plaintiffs would not suffer irreparable harm from their exclusion from Babylon's commercial garbage market, the court entered a preliminary injunction prohibiting the Town and BSSCI from implementing the District garbage collection system.

Babylon and BSSCI appeal from that order. We expedited that appeal, and now reverse.

II. DISCUSSION

A. *Standard of Review*

It is well established in our Circuit that a court may grant a plaintiff preliminary injunctive relief only upon a showing of

> irreparable harm, and either (1) a likelihood of success on the merits of its case or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor.

Polymer Technology Corp. v. Mimran, 37 F.3d 74, 77-78 (2d Cir. 1994) (citation and internal quotation marks omitted). We have explained that

> if the moving party has established the requirements for such an injunction, the injunction may be re-

> versed only if the district court has abused its discretion. A district court may abuse its discretion by applying an incorrect legal standard or by basing the preliminary injunction on a clearly erroneous finding of fact.

Waldman Publishing Corp. v. Landoll, Inc., 43 F.3d 775, 780 (2d Cir. 1994) (citation omitted).

We first review the district court's determination that the plaintiffs had demonstrated a likelihood of success on the merits of their Commerce Clause claim, and then turn to whether plaintiffs have shown that they would suffer irreparable harm.

B. *Likelihood of Success on the Merits*

1. *Commerce Clause Jurisprudence*

The Commerce Clause provides that Congress "shall have Power . . . To regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). This negative restriction on state power has often been labelled the "dormant" Commerce Clause. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 115 S. Ct. 1331, 1335 (1995).

To determine whether a state or municipal activity violates the dormant Commerce Clause, the Supreme Court has instructed us to undertake two separate inquiries. First, we must determine whether the state is "regulating" the market at all, as opposed to merely "participating" in it. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 436-39 (1980). If the state is buying or selling goods as any private economic actor might, then it is

engaging in "market participation" that by definition falls outside the scope of activity governed by the dormant Commerce Clause. *Id.* at 438-39. On the other hand, if the state activity constitutes "regulation" of interstate commerce, then the court must proceed to a second inquiry: whether the activity

> regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce. As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174 (1970).

Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1350 (1994) (citations and internal quotation marks omitted).[10]

The party challenging the validity of a state statute or municipal ordinance bears the burden of showing that it discriminates against, or places some burden on, interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). If discrimination is established, the burden shifts to the state or local government to show that the local benefits of the statute outweigh its discriminatory effects, and that the state or municipality lacked a nondiscriminatory alternative that could have adequately protected the relevant local interests. Id. If the challenging party cannot show that the statute is discriminatory, then it

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[10] **For further discussion of Commerce Clause jurisprudence, we refer the reader to our opinion in *SSC Corp v. Town of Smithtown*, No. 94-9192 (2d Cir. Sept. 19, 1995), filed simultaneously herewith.**

must demonstrate that the statute places a burden on interstate commerce that "is clearly excessive in relation to the putative local benefits." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (quoting *Pike*, 397 U.S. at 142).

In accordance with the Supreme Court's instructions, we proceed to decide whether each component of Babylon's waste management system constitutes "regulation" of commerce and, if so, whether such regulation violates the Commerce Clause. We first examine the Town's relationship with businesses and property owners in the District, where it has elected to occupy the entire field of garbage collection. We then discuss in turn the Town's relationships with BSSCI and Ogden.

2. *The Relationship Between the Town and Businesses and Property Owners in the District*

The Town of Babylon has taken over the local commercial garbage collection market. No private haulers may enter into garbage collection contracts with individual businesses. Instead, the Town (through its contractor, BSSCI) provides exclusive collection services within the District. Relying primarily on *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), the plaintiffs claim that their exclusion from this market facially discriminates against interstate commerce because it favors a single garbage hauler (BSSCI) and a single garbage disposal facility (the Incinerator) over all other in-state and out-of-state competitors. Hence, they argue, the Town's commercial garbage collection system violates the dormant Commerce Clause.

Babylon responds in three ways. First, it argues that its takeover of the local garbage collection market is insulated from Commerce Clause scrutiny because it constitutes "market participation," not "market regulation." Second, the Town argues that even if its assumption of garbage collection duties in the District constitutes market

regulation, it has not discriminated in favor of any local company. Rather, it has evenhandedly prohibited local businesses from entering into contracts with *any* garbage haulers—local or out-of-state—and provided uniform garbage collection and disposal as a government service through its agent, BSSCI. Third, the Town argues that its system does not place an undue burden on interstate commerce. We address each of these arguments in turn.

a. *Market Participation/Market Regulation*

As an initial matter, we hold that the Town's decision to replace the private market for commercial garbage collection with uniform municipal collection is subject to the limitations of the dormant Commerce Clause because it constitutes regulation of that market, not participation in it. Babylon has exercised its governmental powers by denying licenses to all garbage haulers but the one hired by the Town, and by establishing civil and criminal penalties for haulers who collect garbage without a license. Because no private actor could engage in such activity, the Town is acting as a market regulator rather than a market participant. *See SSC Corp. v. Town of Smithtown*, No. 94-9192, slip op. at [18] (2d Cir. Sept. 19, 1995). The Town does "participate" in the garbage collection market in a different respect: it buys garbage hauling services from BSSCI. But states and local governments do not enjoy *carte blanche* to regulate a market simply because they also participate in that market. *Id.* at [18-19]; *cf. South-Central Timber*, 467 U.S. at 97 (plurality opinion) (holding that Alaska may not regulate timber processing market simply because it participates in timber sales market). Particular state actions that do not constitute "market participation" are subject to the limitations imposed by the Commerce Clause. A state engaging in mercantile activity does not obtain blanket immunity to regulate the market in which it participates, free from the strictures of the dormant Commerce Clause. Courts must evaluate separately each challenged activity

of the state to determine whether it constitutes participation or regulation.

b. *Discrimination Against Interstate Commerce*

Although the Town's decision to eliminate the commercial garbage collection market constitutes "market regulation" rather than "market participation," we find that it does not discriminate in any way against interstate commerce. The Town has not favored in-state garbage haulers over out-of-state competitors. *Cf. Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334, 343-44 (1992) (striking down state tax imposed only on hazardous waste generated outside state but disposed of within state). Nor has the Town handicapped other in-state and out-of-state businesses from competing against a group of local proprietors. *Cf. Dean Milk Co. v. City of Madison,* 340 U.S. 349, 356 (1951) (striking down ordinance requiring all milk sold in city to be pasteurized within five-mile radius of city limits.) The plaintiffs argue, however, that Babylon is favoring a single local garbage hauler to the detriment of both in-state and out-of-state competitors. In essence, they argue that the Town's exclusion of private garbage haulers and the hiring of a single garbage hauler —whether that hauler is BSSCI or some other company— is nothing more than a crude facade for a flow control ordinance like the one struck down by the Supreme Court in *Carbone.* Babylon, they claim, has conferred on BSSCI the same favored status that Clarkstown bestowed on its local, privately owned transfer station. We disagree.

No one enjoys a monopoly position selling garbage collection services in Babylon's commercial garbage market, because the Town has eliminated the market entirely. Not even the Town itself remains as a seller in the market. Although the Town is now the lone provider of garbage collection services in the District, it does so as a local government providing services to those within its jurisdiction, not as a business selling to a captive consumer

base. Babylon's waste management plan thus differs dramatically from the flow control ordinances struck down by the Supreme Court in *Carbone* and by this court in *SSC Corp.* In both of those cases, the challenged flow control ordinances required local garbage haulers to buy processing or disposal services from a local facility. *Carbone*, 114 S. Ct. at 1680; *SSC Corp.*, slip op at [3-4]. In Babylon, local businesses do not buy services from anyone. Instead, the Town unilaterally provides garbage servive to everyone in the District. Although taxpayers in the District ultimately foot the bill for these garbage services—just as they foot the bill for street sweeping, street lighting, sewage treatment, public schools, and police and fire protection, to name just a few other basic services provided by local governments—the payment of taxes in return for municipal services is not comparable to a forced business transaction that the ordinances in *Carbone* and *Smithtown* required, and that rendered those ordinances discriminatory against interstate commerce. In short, because Babylon is not selling anything, it cannot be considered to be a favored single local proprietor as in *Carbone*.

New York law makes clear that the Town is fulfilling a governmental duty, not making a sale, when it provides garbage services. New York municipalities have a duty to ensure proper collection and disposal of trash for the well-being and health of the community. *Nehrbas v. Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 194-95 (1957); 1979 N.Y. Op. Att'y Gen. (Informal) 237 ("Generally, the removal of garbage is an affirmative duty properly delegated to and imposed upon municipalities."). To fulfill this duty,

> [a] municipality may perform the function of removal directly through its own department; or it may have it performed under a public contract; or it may require a license to be obtained by persons or firms authorized and qualified to perform that function.

> It is for the municipality, within reasonable bounds, to determine how they shall be collected and removed, or rendered harmless. But it still has the duty to exercise such supervision and control as will prevent danger to public health and injury to the public interest.

P. & A. Carting Co. v. City of New York, 7 Misc. 2d 815, 817 (Sup. Ct., Special Term, N.Y. County 1956) (citation and quotation marks omitted); 1979 N.Y. Op. Att'y Gen. (Informal) 237 ("[M]unicipalities can contract with corporations to perform [the] municipal service [of removing garbage]."). Although a town does not assume the duty to pick up trash itself simply by creating a garbage district, *Industrial Refuse Sys., Inc. v. O'Rourke*, 134 Misc. 2d 45, 52-53 (Sup. Ct. Westchester Cty. 1986), *aff'd as modified sub nom. Pelliccio v. Axelrod*, 131 A.D.2d 650 (2d Dep't), *appeal denied*, 70 N.Y.2d 610 (1987), it may certainly take on that duty expressly. Under New York law, when Babylon prohibited local businesses from arranging privately for garbage removal, it had to ensure that garbage would nevertheless be collected and disposed of properly in some other way.[11]

In Babylon, the Town chose to replace private commercial garbage hauling with public garbage collection—provided not by trucks and employees of the Babylon Department of Public Works, but by an independent contractor (BSSCI) hired by the Town. The Town's decision to hire an outside firm to provide services on the Town's behalf is quite unremarkable. State governments have turned to the private sector to "contract out" or

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[11] We do not hold that the Town has assumed an enforceable duty to collect or dispose of other types of waste, such as construction and demolition debris, that private haulers are still licensed to collect. Nor do we address the situation of a town that provides garbage collection services but does not exclude those within its jurisdiction from entering into individual contracts for waste collection.

"outsource" numerous governmental functions, including services in correctional facilities, the management of concessions in public parks, the operation of mental health facilities, the training of displaced workers, and the operation of toll roads. *See generally* JOAN W. ALLEN ET AL., THE PRIVATE SECTOR IN STATE SERVICE DELIVERY (1989). The same is true of local governments, including in the field of waste disposal. As environmental regulations proliferate, towns may find that their staffs lack the requisite expertise to provide sanitation services in compliance with state and federal mandates. Such expertise may be more readily available in the private sector, from firms that specialize in waste removal. The U.S. Office of Technology Assessment has observed that as municipal solid waste systems become more complex,

> municipalities (especially the smaller ones) may be reluctant to assume the primary responsibility for operating a complex business. The large waste management companies that have emerged are sophisticated in the technical aspects of [municipal solid waste] management and financially capable of accepting some of the associated business risks. At the municipal level, the prospect of contracting out increasingly complicated waste management services has become particularly attractive.

OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, FACING AMERICA'S TRASH: WHAT'S NEXT FOR MUNICIPAL SOLID WASTE 54 (reprint ed. 1991). Another reason why local governments often contract out is to avoid investing large sums of money into capital equipment—equipment that might be more cheaply obtained by financing schemes that involve, among other things, the hiring of outside firms. *See, e.g.*, ALLEN ET AL., *supra*, at 4-5. One survey has shown that, at least in some circumstances, it is more expensive for a local government itself to collect town garbage than for the government to hire a private contractor to do so. BARBARA J. STEVENS,

HANDBOOK OF MUNICIPAL WASTE MANAGEMENT SYSTEMS 9 (1980). While the law may distinguish between activities performed by the Town itself and those performed by independent contractors for purposes of tort liability or agency law, plaintiffs offer no authority for the proposition that these distinctions have any constitutional significance.

The Town has followed the example set by countless other local governments by hiring a private contractor to collect commercial garbage on its behalf. Pursuant to its contract with the Town, BSSCI must collect all garbage put out for pick-up by all "eligible customers"—that is, all commercial establishments on improved property within the District. The Town, in turn, can levy and collect unpaid user fees and benefit assessments as it would collect any other delinquent local tax. N.Y. TOWN LAW § 198(9)(c) (McKinney 1987); 1987 N.Y. Op. Comptroller 86-88, at 3.

In sum, we conclude that town businesses are not forced to purchase anything from the Town (or its agent, BSSCI)—and that the Town has indeed excluded *all* garbage haulers, including BSSCI, from selling garbage collecting services to businesses in Babylon. The Town's waste management system treats all garbage haulers alike and thus does not discriminate against interstate commerce.

The plaintiffs argue that even if the local government could provide exclusive garbage services to all businesses in the District, it nevertheless discriminates against interstate commerce by financing those services through taxes imposed only on businesses and commercial property within the District, rather than through taxes payable by both residents and businesses on a town-wide basis. In support of this argument, plaintiffs point to the Supreme Court's statement in *Carbone* that if "special financing is necessary to ensure the long-term survival" of a solid waste treatment facility, then "the

town may subsidize the facility through general taxes or municipal bonds." 114 S. Ct. at 1684. "General taxes," the plaintiffs contend, are town-wide taxes that " 'are received for the general purposes of the [government], and [that] are, upon proper receipt, lost in the general revenues.' " *Oregon Waste Sys.*, 114 S. Ct. at 1353 (first alteration in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 128 (1968) (Harlan, J., dissenting)). "Special assessments," by contrast, are imposed only "upon property within a limited area for the payment for a local improvement, supposed to enhance the value of all property within that area." *Illinois Cent. R.R. v. City of Decatur*, 147 U.S. 190, 197 (1893). Plaintiffs contend that the two charges imposed by the Town—the $1500 per-parcel benefit assessment payable by commercial property owners and the additional per-cubic-yard user fees payable by town businesses—are targeted against a "narrowly focused group: potential commercial customers of out-of-state disposal companies," and thereby discriminate against interstate commerce.

In our view, the *Carbone* majority used the phrase "general taxes" as a synonym for nondiscriminatory taxes—that is, taxes that apply evenhandedly to in-state and out-of-state businesses. This interpretation finds support in the *Carbone* majority's citation to *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988) ("Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]; discriminatory taxation of out-of-state manufacturers does."). The Town imposes its fees uniformly throughout the District upon all commercial property, and upon all businesses on such property. The Town does not differentiate between local and nonlocal businesses. Accordingly, we cannot say that those taxes discriminate against nonlocal taxpayers in favor of local taxpayers.[12]

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[12] There is no reason to assume that by "general taxes" the Supreme Court meant "general revenue taxes"—that is, taxes that are commingled with other municipal revenues. The courts have

Plaintiffs argue that by taxing only commercial property and businesses, the Town is focusing its tax burdens on the entities more likely to engage in interstate commerce—more likely, that is, than individual town residents. If we were to accept this argument, however, all taxes imposed solely on "commercial" entities would in-

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generally distinguished "special assessments" from "general revenue taxes" not when determining whether those fees discriminate against interstate commerce, but rather, when determining whether they are "fairly related to services provided to the State"—one of four requirments which a state tax must satisfy to survive a Commerce Clause challenge under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). According to *Complete Auto Transit*, a state tax is valid if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* General revenue taxes satisfy the fourth prong of the *Complete Auto Transit* test so long as they are reasonably related to the extent of the taxpayer's contacts with the State. The courts will not inquire as to whether the state's gross receipts from a "general revenue tax" match, dollar for dollar, the benefits returned to the taxpayer. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625-28 (1981). Special assessments and user fees, by contrast, which "are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services," are subject to a somewhat more demanding standard. *Id.* at 622 n.12. Those taxes must not be " 'manifestly disproportionate to the services rendered' " by the state. *Id.* (quoting *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)). Because it is undisputed that the Town uses all of the revenue from its user fees and benefit assessments to defray its expenses in providing garbage services to the District, we cannot conclude that the amount of those assessments is "manifestly disproportionate" to the benefits the Town confers in return. *Cf. Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 719-20 (1972) (upholding state and municipal head tax on airline passengers to defray costs of airport construction and maintenance, in part because plaintiffs failed to show fees "to be excessive in relation to costs incurred by the taxing authorities"). In any event, the plaintiffs do not explicitly press the argument that the Town's two assessments would be invalid under *Complete Auto Transit*, but rather, focus on the fact that the fees are not imposed on both commercial and residential entities throughout the entire Town.

herently discriminate against interstate commerce, and thus fall under the "virtually *per se* rule of invalidity" under the Commerce Clause. Presumably, such a rule would sweep away everything from state corporate income taxes to corporate franchise taxes. The flaw in the plaintiffs' argument is obvious, however: the local businesses subject to these taxes are equally likely to engage in *local* commerce as to engage in *interstate* commerce. The Town's imposition of benefit assessments and user fees within the District has the legitimate, nonprotectionist goal of apportioning the costs of providing services to that district in an equitable manner. It is the nature of a local improvement district that the town provides services only to property or persons within the district, and that those entities bear all of the costs of those town services. *See, e.g.*, N.Y. TOWN LAW § 198(9)(b) (McKinney 1987). Under New York law, town boards may establish "improvement districts" to provide any of several enumerated services, "wholly at the expense of the district": sewers, drainage, water, water quality treatment, parks, public parking, lighting, snow removal, water supply, sidewalks, fallout shelters, refuse and garbage collection, aquatic plant growth control, ambulance service, harbor improvement, public dock, beach erosion control. *Id.* § 198 (McKinney 1987 & Supp. 1994).[18] All of these

[18] The New York Legislature has also authorized specified local governments to establish other types of improvement districts. For example, any town in Suffolk County is authorized to create a special improvement district for the disposal of duck waste. N.Y. TOWN LAW § 198-a (McKinney 1987). The town may charge users and property owners (usually, those who operate and own duck farms) within the district "duck waste charges" based on the volume of duck waste the Town treats, or upon any other equitable basis that the town board chooses. *Id.* § 198-a(2).

Duck waste districts (whence, presumably, the phrase "down in the dumps") might be said to enjoy a special nexus with foreign commerce. *Cf. Missouri v. Holland*, 252 U.S. 416, 434-35 (1920) (upholding Migratory Bird Treaty Act, 40 Stat. 755 (1918), pursuant to congressional power to implement treaties, and describing

districts are financed through charges levied against those individuals who benefit from the services provided within that district. In general, the town may levy assessments based on either an "*ad valorem* basis," meaning against property owners in proportion to the value of the property, or a "benefit basis," meaning in proportion to the actual benefit conferred by the district on property. *Id.* § 202. Making local businesses bear the tax bill for municipal services does not discriminate against interstate commerce.

c. *The Pike Balancing Test: Undue Burden on Interstate Commerce*

Having concluded that Babylon's assumption of collection duties in the garbage market does not discriminate against interstate commerce, we now must evaluate its commercial waste disposal system under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In that case, the Court stated that where a

> statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Id. at 142.

We first determine whether the Town has imposed any burdens on interstate commerce. We have explained that the "incidental burdens" to which *Pike* refers "are the burdens on interstate commerce that exceed the burdens on intrastate commerce." *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994) (citing *Clover Leaf Creamery Co.*, 449 U.S. at 471-72); *see also Pacific Northwest Venison Producers v. Smitch*, 20 F.3d

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migratory birds as a "national interest of very nearly the first magnitude" since they are both "a food supply" and "the protectors of our forests and our crops").

1008, 1015 (9th Cir.) (explaining that "incidental burdens" on interstate commerce include disruption of interstate travel and shipping due to lack of uniformity in state laws, impacts on commerce beyond the borders of the state, or burdens that fall more heavily on out-of-state interests), *cert. denied,* 115 S. Ct. 297 (1994). Although Babylon's takeover of the local commercial garbage market may have some relatively minor effects on both interstate and local commerce, it will not impose any different burdens on nonlocal as opposed to local garbage haulers. That is, while the takeover will result in only one garbage hauler collecting commercial garbage on the Town's behalf in Babylon, the new system will not necessarily increase or decrease interstate commerce in garbage collection. Any impact on interstate commerce would depend on whether a single buyer (the Town), purchasing collection services in bulk for the entire District, would tend to hire out-of-state garbage haulers more often or less often than numerous buyers (Babylon's individual businesses) would have under the old system. Those buyers, like the Town, could have preferred a local garbage hauler to a nonlocal hauler, or vice versa, for any reason: cost, quality of service, or prior business relationship, just to name a few. There is no reason to assume that by shifting all hiring of garbage haulers into the hands of one buyer, the flow of interstate commerce will be reduced, and thereby burdened. In fact, the open bidding process used by the Town to hire a single garbage hauler could readily result in the hiring of an out-of-state garbage hauler—which would actually shift a portion of the garbage collection market *into* interstate commerce. *See Clover Leaf Creamery,* 449 U.S. at 473 (observing that although state statute banning nonrecyclable milk containers would presumably cause market disruptions, "there is no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms"). Accordingly, we find that Babylon has imposed no greater burdens on nonlocal firms than it has placed on local firms.

The plaintiffs also attack the Town's system of benefit assessments and user fees, on the theory that by forcing local busineses to pay the Town for garbage hauling, businesses will be unwilling to hire a private hauler and essentially pay for garbage collection a second time. But the Town's takeover of the garbage collection system, not the tax system, prevents local businesses from hiring private haulers to pick up their garbage. Even if the Town financed garbage collection for the District from "general revenues"—for example, by increasing the town-wide *ad valorem* property tax—businesses would still be prohibited from hiring private haulers. Upon closer scrutiny, it becomes clear that the plaintiffs do not seriously challenge the Town's taxation system. Rather, they dispute the *use* to which the Town has put their tax dollars—to provide garbage collection and disposal services. In this sense, the plaintiffs' challenge to the tax system is really a reformulation of their challenge to the Town's assumption of collection duties in the District. We have already rejected the notion that the Town's provision of exclusive sanitation services places any burdens on interstate commerce, since the Town prohibits *all* garbage haulers from contracting with local businesses. We likewise reject the notion that this local tax system—typical of local tax systems across the country—places any burdens on interstate commerce.

Absent a showing by the plaintiffs that the Towns' waste collection system places any extra burden on out-of-state companies, or on local companies engaged in interstate commerce, we must conclude that the Town has not imposed any "incidental burdens" on interstate commerce that "are clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

We nevertheless note that Babylon has legitimate—indeed, compelling—interests that are served by its waste management program. In our multi-tiered federal system,

local governments have historically borne primary responsibility for ensuring the safe and reliable disposal of waste generated within their borders—a role that Congress has expressly recognized. Resource Conservation and Recovery Act ("RCRA"), § 1002(a)(4) (codified at 42 U.S.C. § 6901(a)(4) (1988)). ("[C]ollection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . ."). The Town must meet targets for solid waste recycling set by overlapping state and federal mandates. *See, e.g.*, N.Y. GEN. MUN. LAW § 120-aa (McKinney 1986 & Supp. 1994) (requiring local government to enact ordinances mandating source separation of recyclable items from solid waste); *see also* 40 C.F.R. § 256.31 (1994) (requiring states receiving federal assistance under RCRA to plan for source separation, recycling, and resource conservation). Local governments must enjoy some leeway in arriving at creative ways to cope with the solid waste crisis.

3. *The Town's Relationship with BSSCI (the Garbage Hauler)*

The plaintiffs argue that BSSCI is a "single local proprietor" that is favored by Babylon in three ways. As discused above, they claim primarily that BSSCI enjoys a captive customer base because the Town prohibits other private haulers from competing with it in the local commercial garbage market. Property owners and commercial enterprises, they contend, are thereby forced to do business with the designated garbage hauler. This, they argue, mirrors the situation in *Carbone*, where the Supreme Court struck down a municipal ordinance that required all town garbage to be processed at a local, privately owned transfer station. 114 S. Ct. at 1683. We need not revisit our rejection of that argument. BSSCI is merely a contractor hired to collect garbage on the Town's behalf, not a favored seller of garbage collecting

services with whom local companies are forced to do business.

Plaintiffs raise two further objections to the Town's contract with BSSCI—objections that are somewhat ancillary to the Town's takeover of the garbage collection market. First, the plaintiffs claim that besides a monopoly, BSSCI enjoys an unfair advantage over its competitors because the Town lets it dispose of commercial waste for free at the Incinerator. According to the plaintiffs, this subsidy is comparable to the one invalidated by the Supreme Court in *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994), where Massachusetts had funnelled revenue from a tax on all milk sold in the state to Massachusetts dairy farmers only. Second, the plaintiffs argue that BSSCI has been the special object of the Town's favor, and that the process for selecting a town garbage hauler was skewed in that firm's direction. We are not perusaded by the analogy to *West Lynn Creamery*, or by the plaintiffs' allegations of favoritism towards BSSCI. Both the Town's exercise of its dumping rights at the Incinerator and its hiring of a garbage hauler involve a local government spending tax dollars for the benefit of its citizens—paradigmatic examples of "market participation" that are not subject to the limitations of the dormant Commerce Clause. Furthermore, we note that even if the Town's actions constituted "market regulation," they would nevertheless pass muster under the Commerce Clause.

a. *Market Participation/Market Regulation*

The Town's decision to let BSSCI dump trash collected in the District for free at the Incinerator constitutes market participation—not discrimination against interstate commerce. As described earlier, the Town effectively owns the Incinerator, and pays Ogden a monthly service fee to operate the facility; the Town owns exclusive rights to dispose of waste there. The Town may exercise those

rights as it sees fit. It could sell those rights on the open market. For example, it has entered into a seven-year agreement with the Nassau/Suffolk Hospital Council to burn treated, regulated medical waste at the Incinerator at a rate of $240 per ton. Alternatively, the Town could re-sell those rights only to town residents, just as South Dakota sold cement from its factory only to state residents in *Reeves*, 447 U.S. at 440. Instead, the Town has chosen to give away those rights for free, to dispose of garbage generated by town businesses. Babylon's decision to let BSSCI dump trash for free at the Incinerator therefore constitutes municipal participation in the waste disposal market.

Plaintiffs also argue that the process Babylon used to select a particular garbage hauler was skewed in favor of BSSCI, a consortium of Long Island garbage haulers. In other words, plaintiffs argue that the Town's seemingly neutral takeover of the garbage market was in fact a pretense for handing BSSCI a local garbage monopoly. But allegations that the Town favored BSSCI are irrelevant because the market participation doctrine permits the Town to hire whatever company it chooses, on whatever terms it chooses, to provide municipal services. As the Supreme Court has held, "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (footnote omitted); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 207 (1983); *see also SSC Corp.*, slip op. at [14-16]. When a local government decides to provide a municipal service such as garbage collection to its residents, it need not buy garbage trucks or put drivers on the town payroll to pass constitutional muster. Instead, it can hire an outside contractor to provide those services to the town. In *Massachusetts Council of Construction Employ-*

ers, for example, the Supreme Court held that the City of Boston could require its building contractors to hire at least fifty percent of their workforce from among Boston residents. 460 U.S. at 214-15. Because all of the employees covered by that mandate were "in a substantial if informal sense, 'working for the city.'" Boston was considered to be simply favoring its own residents through the expenditures of municipal funds. *Id.* at 211 n.7. As the Court stated, "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *Id.* at 208. Nothing in the Constitution precludes a local government from hiring a local company precisely because it is local.

b. *Discrimination Against, or Burdens on, Interstate Commerce*

In any event, there is no evidence that Babylon (1) is "subsidizing" BSSCI by allowing it to dump town garbage at the Incinerator for free, or (2) selected BSSCI because it is a consortium of local companies.

The plaintiffs' first argument, that the Town is subsidizing BSSCI by letting it dump garbage for free at the Incinerator, ignores economic reality. Although a customer normally pays its garbage hauler once for two services, collection and disposal, Babylon has purchased those services separately. The Town pays BSSCI to collect town garbage, and Ogden to incinerate it. If Babylon had so desired, it could have charged BSSCI "tipping fees" to dump town trash at the Incinerator—as the neighboring town of Smithtown has done. *See SSC Corp.*, slip op. at [4]. By charging fees at the Incinerator, the Town could eliminate its hauler's arguable incentive to insinuate non-contract garbage into the garbage it dumps for free at the Incinerator. *See id.* at [24]. But if BSSCI had to pay to dispose of town garbage, it would have passed those costs back to Babylon in a higher bid. The Town therefore saves money in its contract with

BSSCI by letting it dump for free at the Incinerator. The disposal component of the contract is therefore a wash—not a subsidy—for BSSCI.

Likewise, plaintiffs' allegations of bias in favor of BSSCI are so insubstantial that, even if the Town's hiring of a garbage hauler were subject to the limitations of the dormant Commerce Clause, we would nevertheless conclude that the Town's selection of BSSCI neither discriminated against nor imposed any burden on interstate commerce. Babylon conducted an open bidding process to find a garbage hauler for its District, pursuant to § 120-w(4)(e) of the New York General Municipal Law (McKinney 1986). According to an undisputed affidavit of the Town Comptroller, the Town "aggressively solicited proposers from a national audience" by sending out bid packages to sixty-nine companies across the country, twenty-four of which were based outside New York. The Town also notified national trade publications of the bidding process, spoke with representatives of industry trade groups such as the Solid Waste Association of North America, and contacted national waste hauling firms by telephone to generate interest in bidding. Furthermore, the Town did not impose any geographical eligibility limitations on those who bid to provide collection services in the District.

The plaintiffs argue that, despite these efforts to generate nationwide interest in bidding, the Town skewed the selection process in favor of BSSCI, which was ultimately awarded the contract to collect commercial garbage within the District. In evaluating the various bids that were submitted, the Town Board placed significant weight on whether the bidder had "[e]xperience identical to or related to that required under this procurement" and "[e]xperience in transition and implementation of services identical to or similar to services required under this procurement." BSSCI received the highest marks in that category, since its principals had already proven

their ability to start up a new collection system smoothly and efficiently as members of the consortium serving as the town's garbage hauler in the Babylon Residential District. Furthermore, the draft contract contained in the request for proposals required successful bidders to maintain a local office in Babylon and to keep off-duty garbage trucks "parked securely in a central yard, established by the Contractor, within the Town of Babylon."

Despite the plaintiffs' protestations to the contrary, none of these factors detracted from the nondiscriminatory nature of the Town's bidding process, or resulted in any undue burdens on interstate commerce. First, plaintiffs neglect to mention that the Town selected BSSCI not only because of its prior experience hauling garbage in Babylon, but also because it submitted the lowest-priced bid. Indeed, the Town considered the relative merits of the submitted bids according to several distinct criteria, including cost, prior experience, ability to provide equipment and support services on the schedule requested by the Town, and ability to meet financial obligations. Second, the requirement of maintaining a secured parking lot and a local office can hardly be considered discrimination against interstate commerce. At most, such a requirement would amount to a burden on nonlocal firms that would have to establish in-town service locations if awarded the contract. But such burdens are *de minimis* when we consider the fact that the chosen hauler must, by the nature of the garbage collection services, pick up garbage *locally*—from businesses situated within the Town. Because the hauler's trucks must be available at a moment's notice to provide back-up service within the District, their geographic proximity to the District is a *sine qua non* of the contract. Furthermore, as the Town explains, local officials can more easily monitor the garbage hauler's performance of its contractual duties —including the maintenance of a dedicated fleet of collection vehicles—if those vehicles are kept in a single location accessible for inspections. Similarly, the main-

tenance of a local office will also enable consumers to file complaints more readily, as well as to ensure that the contractor is responsive to local needs. In short, the requirement that these support services (purchased by the town) be provided locally places nothing more than a *de minimis* burden on interstate commerce—a burden which is far outweighed by the nondiscriminatory local interests served by ensuring reliable, consistent sanitation service to town businesses.

4. *The Town's Relationship with Ogden (the Incinerator Operator)*

The plaintiffs also argue that the garbage disposal component of the Town's waste management plan impermissibly favors the Incinerator over all other in-state and out-of-state disposal facilities. First, they contend that the Town has effectively guaranteed that all District waste will be disposed of at the Incinerator by letting BSSCI dump commercial waste there for free. This, they contend, has closed off the local commercial garbage market to out-of-state competition. Second, they argue that the benefit assessments and user fees charged by the Town against property and businesses in the District, coupled with the use of those funds to support operation of the Incinerator, constitutes a tax-and-subsidy scheme that discriminates against interstate commerce like the one struck down in *West Lynn Creamery*, 114 S. Ct. at 2205. We address each argument in turn.

a. *Market Participation/Market Regulation*

First, we conclude that the Town is engaging in market participation both when it purchases incinerating services from Ogden, and when it exercises its rights to use those services by letting BSSCI dump town garbage at the Incinerator for free. The Town acts as a buyer in the market for incinerating services when it uses tax dollars to repay municipal bonds and to pay Ogden to op-

erate the Incinerator. This is a simple act of government procurement. As the Supreme Court has observed, "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the market." *Reeves*, 447 U.S. at 437.

Having bought those incinerating services, the Town may use them as it chooses. As discussed earlier, the Town sells some incinerating services to a local hospital council for the disposal of medical waste. Instead of selling the remainder of its rights to use the Incinerator, the Town uses them to dispose of trash that BSSCI collects from the commercial garbage improvement district. (The Town also may reserve some of the disposal rights for garbage from its residential garbage district, but the details of collection and disposal there are not before us.) The Town is acting completely within the proper bounds of its discretion when it charges BSSCI nothing to use those rights.

The district court correctly observed that by letting BSSCI dump garbage for free at the Incinerator, the Town has created "not only a powerful, but virtually an irresistible incentive to dispose of the waste at the town facility." By lowering its tipping fees to zero, the Town has guaranteed a flow of garbage to its Incinerator. But local governments are perfectly free, as market participants, to use economic incentives to benefit local businesses. We repeat the Supreme Court's observation in *Alexandria Scrap* that the Commerce Clause poses no barrier to a state "participating in the market and exercising the right to favor its own citizens over others." 426 U.S. 810. This is perfectly consistent with *Carbone*, as well. Indeed, what some commentators have labelled "economic flow control" is precisely what Justice O'Connor suggested would be fully consonant with the majority's holding in *Carbone*. 114 S. Ct. at 1690 (O'Connor, J., concurring) (suggesting that Clarkstown could have financed its transfer station "by lowering its price for processing to a level competitive with other waste

processing facilities"); *see* Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-*Carbone *World*, 22 FORDHAM URB. L.J. 361, 404 (1995) ("Economic flow control is achieved when haulers deliver solid waste to a facility because the costs of disposal at the facility, including transportation costs and tipping fees, are less than or comparable to those at alternative disposal sites.").

b. *Discrimination Against, or Burdens on, Interstate Commerce*

The plaintiffs reply that even if the Town's purchase of incinerating services does constitute market participation, its *financing* of those incinerating services through property taxes and user fees nevertheless constitutes an unconstitutional "regulation" of interstate commerce. In support of their argument, the plaintiffs claim that Babylon's taxing scheme is no different from the one struck down in *West Lynn Creamery*. In that case, Massachusetts imposed a facially neutral tax on all milk sold in the state. All of the money collected was then distributed to in-state dairy farmers. The effect of the scheme, the Supreme Court found, was to increase local producers' share of the state milk market. The Court also rejected the state's argument that its program was valid because neither the tax on the one hand, nor the subsidy on the other, independently violated the dormant Commerce Clause:

> [The state's] argument would require us to analyze separately two parts of an integrated regulation, but we cannot divorce the premium payments from the use to which the payments are put. It is the entire program—not just the contributions to the fund or the distributions from that fund—that simultaneously burdens interstate commerce and discriminates in favor of local producers. The choice of constitutional means—nondiscriminatory tax and local sub-

> sidy—cannot guarantee the constitutionality of the program as a whole.

114 S. Ct. at 2215. Unlike the Massachusetts milk scheme, however, Babylon's financing system does not "subsidize" BSSCI or Ogden. Instead, the Town spends its tax revenues to *purchase* services for town residents —a traditional, and unexceptionable, municipal activity. Babylon buys garbage collection services from BSSCI and incinerating services from Ogden. Nor, as explained earlier, does the Town subsidize BSSCI by letting it dump town garbage for "free" at the Incinerator; rather, the Town pays less to BSSCI in the first place for collecting garbage because BSSCI does not have to pay for garbage disposal. If anyone is "subsidized" by the user fees, it is the municipal treasury—not any private business. And that, of course, is the point of every tax.

Thus, although we agree that the Town's tax system constitutes "regulation," we disagree that it has any discriminatory effect, or that it impermissibly burdens interstate commerce. To the contrary, we believe that the Town of Babylon has taken to heart the Supreme Court's admonition in *Carbone* that if "special financing is necessary to ensure the long-term survival" of the incinerator, then "the town may subsidize the facility through general taxes or municipal bonds." 114 S. Ct. at 1684. Babylon has employed both taxes and bonds. It levies a $1500 flat tax on all improved commercial properties in the district, as well as a "user fee" for each cubic yard of garbage generated on each parcel above a fixed base amount. We believe that both of these fees qualify as the sort of taxes the Supreme Court had in mind in *Carbone*. Although most municipalities raise the bulk of their funds through *ad valorem* property taxes, many also employ income or sales taxes, as well as special levies designed to pay for specific municipal services like schools, roads, fire fighting, or sewer service. It is not remarkable, therefore, to see a town create a waste control district and to spread its costs among those who reap

the benefit of services provided in that district. The $1500 flat property tax is perhaps a rough estimate of the benefit accorded to each parcel of property in the district; but plaintiffs do not contend that it is out of all proportion to the benefit conferred on each parcel. The per-cubic-yard user fee, by contrast, corresponds much more closely to the benefit enjoyed by each waste generator in the District. Each business pays tax on the garbage they generate, above a fixed amount. Not only is this tax fairer than an *ad valorem* tax—because it taxes businesses based on the actual amount of municipal services they consume—but it also creates a greater incentive for businesses to reduce the amount of waste they generate. We cannot take exception to either of these purposes of Babylon's tax system.

5. *Municipal Reliance on Long-standing Precedent*

Finally, we note that we must decide this case against the backdrop of two venerable, and until now unchallenged, decisions of the Supreme Court. In *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), and *Gardner v. Michigan*, 199 U.S. 325 (1905), the Court upheld the authority of San Francisco and Detroit to grant exclusive rights to collect and dispose of garbage within the city to single scavenger companies, who in turn would incinerate the garbage. The Court rejected takings and due process challenges to those systems. Justice Harlan, speaking for the Court, spoke of the pressing need for municipalities to enjoy some flexibility in formulating solutions to the waste disposal crises then facing them:

> Many of the questions involved in municipal sanitation have proved to be difficult of solution. There is no mode of disposing of garbage and refuse matter, as found in cities and dense populations, which is universally followed. In some cities garbage receptacles, properly covered, are provided, sometimes

by the householder, sometimes by the municipal authorities or the garbage collector. But even such devices often prove to be worthless for want of proper attention to them by householders. Then, the question arises for the consideration of the municipal authorities as to the frequency of the removal of garbage. The practice of not at all uniform. In some cities, it is collected seven times a week; in others, six, four, and three times a week. Again, questions arise as to the mode in which garbage should be collected; and the statement is made by those who have investigated the subject, that while "there appears a well-nigh unanimous demand on the part of health officers, and oftentimes of the public generally, for the municipal collection of garbage," the "problem of garbage disposal has not been solved." . . .

These references to the different methods employed to dispose of garbage and refuse have been made in order to show that the Board had before them a most difficult problem—unsolved by experience or science—as to the best or most appropriate method of protecting the public health in the matter of the disposal of the garbage, refuse and other materials found on private premises, and in hotels, restaurants and like places. The State, charged with the duty of safeguarding the health of its people, committed the subject to the wisdom and discretion of the Board of Supervisors. The conclusion it reached appears in the ordinances in question, and the courts must accept it, unless these ordinances are, in some essential particular, repugnant to the fundamental law.

California Reduction, 199 U.S. at 320-21 (citation omitted). These rulings of the Supreme Court have engendered important reliance interests at the state and local level. The New York Court of Appeals, for example, long ago declared that a municipality could pass an ordinance prohibiting the collection of garbage by persons

unlicensed by its health department, and then declare that no licenses should be granted except to the person having a contract with the city for the collection of garbage. *City of Rochester v. Gutberlett*, 211 N.Y. 309, 317 (1914) ("Experience has shown that, when there are many collectors of garbage within a municipality acting independently although under license, it is difficult to maintain the supervision necessary to preserve the public health; while, with one contractor acting under a contract pursuant to which he is paid and for the faithful performance of which he is required to give a bond with sureties, the public health can be and is better and more surely protected."); *id.* at 318-20 (relying on *California Reduction* and *Gardner*). The challenges associated with sanitary waste disposal have not diminished in the last ninety years. Local governments have continued to shoulder the primary responsibility for solving waste disposal problems—a role that has been recognized by Congress. *See, e.g.*, Resource Conservation and Recovery Act § 1002(a)(4) (codified at 42 U.S.C. § 6901(a)(4)) (1988) (congressional finding that "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies" supplemented by federal financial and technical assistance).

We recognize that the Supreme Court was not faced wih Commerce Clause challenges to the Detroit and San Francisco waste disposal systems, and that those cases do not dispose of the much narrower issues we are faced with today. *See, e.g., Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) ("Local regulations which would pass muster under the Due Process Clause might nonetheless fail to survive other challenges to constitutionality that bring the Supremacy Clause into play. Like any local law that conflicts with federal regulatory measures, state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow.") (citations omitted); *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (distinguishing between Due

Process and Commerce Clauses). Yet we cannot brush aside two Supreme Court precedents that dealt with waste disposal systems so similar to the one before us today. If we were to rule in plaintiffs' favor, the municipal garbage systems upheld by the Court in *California Reduction* and *Gardner* would be unconstitutional, and municipalities could no longer undertake the traditional local governmental function of collecting town garbage.

We decline the invitation to derive such a revolutionary proposition from the Supreme Court's decision in *Carbone*—an opinion that described itself as unremarkably invalidating "just one more instance of local processing requirements" that the Court had long held invalid. 114 S. Ct. at 1682. As Chief Justice Marshall once wrote, "an opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established." *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693). We refuse to undercut the long-standing precedents of *California Reduction* and *Gardner* absent clear indication from the Supreme Court that the Commerce Clause is now to be interpreted to effectively preclude local governments from providing basic sanitation services such as garbage collection on an exclusive basis, and financing those services by taxing local residents.

We therefore conclude that the plaintiffs have failed to state a viable claim under the Commerce Clause, and therefore have not demonstrated that they are likely to succeed on the merits. Furthermore, we note that the defendants moved for dismissal in the district court, that the parties have exhaustively briefed the issues before us, and that the Commerce Clause claims may be resolved as a matter of law. Accordingly, we find that

> this is an appropriate case for invoking the doctrine of *Smith v. Vulcan Iron Works*, 165 U.S. 518, 525,

> 17 S.Ct. 407, 410, 41 L.Ed. 810 (1897); *North Carolina Railroad Co. v. Story*, 268 U.S. 288, 292, 45 S.Ct. 531, 532, 69 L.Ed. 959 (1925); and *CES Publishing Corp. v. St. Regis Publications, Inc.*, 531 F.2d 11, 15 (2 Cir. 1975), that when on appeal from the grant of a preliminary injunction it appears that the "bill had no equity to support it", 165 U.S. at 525, 17 S.Ct. at 410, a court of appeals should direct dismissal of the complaint.

Friarton Estates Corp. v. City of New York, 681 F.2d 150, 160-61 (2d Cir. 1982); *see Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 252-53 (9th Cir. 1973); *see also* 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3937, at 269 (1977) ("On appeal from grant or denial of a preliminary injunction, . . . it may make excellent sense to determine whether the complaint states a claim on which relief can be granted."). We therefore direct dismissal of the plaintiffs' Commerce Clause claims.

C. *Irreparable Harm*

Finally, we address the district court's unusual decision to grant preliminary injunctive relief despite its explicit finding that plaintiffs would not suffer any irreparable harm as a result of the implementation of Babylon's solid waste management plan.

It is settled law in our Circuit that, as a general matter, a plaintiff must make a showing of irreparable harm before a court may issue preliminary injunctive relief. *See Polymer Technology Corp. v. Mimran*, 37 F.3d 74, 77-78 (2d Cir. 1994). Nevertheless, the district court stated that it would "grant the motion for injunction, notwithstanding the fact that I don't think irreparable harm has been shown." We have described a showing of irreparable harm as the *sine qua non* for preliminary injunctive relief, *Buffalo Forge Co. v. Ampco-Pittsburgh Corp.*, 638 F.2d 568, 569 (2d Cir. 1981), and such a

departure from established precedent clearly constitutes an abuse of discretion. *See JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990) (reversing grant of preliminary injunction where district court found only "possibility" rather than "likelihood" of irreparable harm).

Although plaintiffs concede that the district court misapplied the standards for granting equitable relief, they nevertheless urge us to comb the record for facts that would support a finding of irreparable harm. It is true that we may affirm "on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993). In this case, however, the district court explicitly found that plaintiffs had *not* demonstrated irreparable harm. We could only affirm the preliminary injunction, then, by determining that the district court's factual finding was "clearly erroneous." Because the record supports the district court's determination that plaintiffs' alleged injuries would be entirely financial—and therefore remediable by an award of money damages—we cannot say that the district court clearly erred when it found that the plaintiffs had not demonstrated irreparable harm.

III. Conclusion

This case boils down to two simple propositions. First, towns can assume exclusive responsibility for the collection and disposal of local garbage. Second, towns can hire private contractors to provide municipal services to residents. In neither case does a town discriminate against, or impose any burden on, interstate commerce. The local interests that are served by consolidating garbage service in the hands of the town—safety, sanitation, reliable garbage service, cheaper service to residents—would in any event outweigh any arguable burdens placed on interstate commerce.

In summary, we uphold Babylon's waste management system. We reverse the district court's entry of the preliminary injunction, and dismiss the plaintiffs' claims under the Commerce Clause because:

1. The plaintiffs failed to establish a likelihood of success on the merits, because the Town's waste management scheme does not violate the dormant Commerce Clause; and

2. Evidence in the record supports the district court's finding that plaintiffs will not suffer irreparable harm from implementation of the Town's waste management plan.

Accordingly, we dismiss plaintiffs' claims under the Commerce Clause, as well as plaintiffs' civil rights claims premised upon violations of the Commerce Clause. The plaintiffs in *USA Recycling, Inc. v. Town of Babylon*, No. 95-7129, raise additional claims under various statutory and constitutional provisions. The plaintiffs in *A.A. & M. Carting Service, Inc. v. Town of Babylon*, No. 95-7131, arguably raise a claim under the Sherman Act. We therefore remand for further proceedings on any remaining claims, consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 94 5571

A.A. & M. CARTING SERVICE, INC.,
Plaintiff,

v.

TOWN OF BABYLON,
Defendant.

CV 94 5729

USA RECYCLING, INC.,
Plaintiff,

v.

TOWN OF BABYLON,
Defendant.

Before: HONORABLE THOMAS C. PLATT, Chief U.S.D.J.

[2] THE CLERK: Civil motion, A.A. & M. Carting, and USA Recycling versus the Town of Babylon.

THE COURT: I sorry to keep you waiting, ladies [3] and gentlemen.

I am going to ask you alla number of questions before I tell you what I have in mind.

We never had sort of a common statement of facts, but it doesn't seem to me tiere is much disagreement on what the facts are in this cas.

Am I wrong in that?

MS. CHRISTIAN: I think that is correct, your Honor.

MR. AMOROSO: That's right, your Honor.

MR. EISENBUD: Yes.

THE COURT: We have one motion to dismiss by the town. There is no—it wasn't a motion for summary judgment. There isn't a motion, a counter motion in any way by the plaintiffs. And yet, in the light of my most recent thinking on this case, which is going—I think it's where do we go from here? It seems to me that this is basically a matter of law, and it's not really a question other than a question of law. It's a question of law that no matter what I do here is going to be—is going involve an appeal by one side or the other.

And if we are going to get as prompt a resolution, as I think both sides want, for their—not only for their own peace of mind, but for their own monetary reasons, I think the question is, as a practical [4] matter, how best to proceed.

I could tell you now, based on the limited time I have had available, at least on what I have been able to do, what my basic thinking is. I don't want what I would propose to do and then let the appeal process take it. Proceed immediately and proceed as quickly as possible. I think that is the appropriate way to handle it.

It being a question of law, I think I am inclined to do something I might not otherwise do if it was not in my mind quite so. Definitely a question of law.

But I will tell you what—and I will explain it to you and then you can proceed accordingly. I think that is about the only way that I can do it.

I've had the benefit of Judge Tannenbaum's decision in the state court involving the same ordinance. Not the same one, the predecessor ordinance as it exists now.

But one of the factors that was involved in the decision before him was this question of irreparable harm. And, Judge Tannenbaum, for whatever reason—and, of course,

I didn't have all of the facts before him. I found that there was no irreparable harm shown by the plaintiffs. A proposition with which, I must say, based [5] on what is shown to me, I basically have no reason to disagree with.

In any event, I understand what the parties have expounded to me, namely, the plaintiffs say that they suffer irreparable harm by virtue of the fact that 75 or 90 percent lost profits on behalf of one or more of the plaintiffs, but there is a—there is no irreparable harm in the totally destructive sense, and it is a question of monetary damages.

And while, in the case of First Amendment constitutional violations, there is very rarely a case that you could be made whole by monetary damages in a case of this kind. I think the likelihood of not being able to be compensated for monetary damages is probably pretty thin.

But nonetheless, and while under normal circumstances, I will say that that would be a major factor in my thinking on this injunction question.

I am very troubled about saying that I should deny injunctive relief for—preliminary injunctive relief, in any event, because I think permanent injunctive relief, as I view the case, is probably the ultimate answer that would emanate from this Court, unless I am totally mistaken on my analysis of Carbone against the Town of Clarkstown.

[6] And were I writing on a clean slate, which I am not, I might well have come down in the same vein as the three dissenting judges and certainly I would subscribe to the view of Justice O'Connor that there is—I find it very hard to understand how you get discrimination where all of the parties, both inside the town and outside the town, and inside the state and outside the state, are all treated equally.

But there are five people with a lot more wisdom than I have, collectively or otherwise, have reached a contrary conclusion.

So the long and short if it is I am going to dictate into the record a summary of my analysis. But the long and short of it is, I think, that I am going to preserve the status quo and I am going to require the plaintiff to put up something of a bond, and we can discuss that after I am finished.

But I am going to preserve the status quo and let the town see if they can't persuade the Second Circuit that I have misanalyzed the Carbone case.

Let me give you a little bit by way of background factual data, which I don't think there is much disagreement with, and then point out to you wherein I think the Carbone case controls here.

And I am fully aware—don't misunderstand, and [7] the record should be clear, that I am fully aware that the Carbone decision only dealt with part of this problem, in a sense that it only dealt with it by what I will call a disposal part of this disposal step in the process and not the collection step.

And there may well be, although I can't pick it up from the dicta of what was said in the Carbone case, that it could be separated and dealt with separately. But again, were I writing on a clean slate, I might say to the Town of Babylon, you might achieve success were you not to have roped in the disposal step and dealt solely with the collection step.

But for the reasons that I will indicate to you in a moment, I am not so sure that the majority would still go along, although it might well be five to four in the light of Justice O'Connor's observation that there is no discrimination in that part of the process.

So, for the record, traditionally, waste products generated from commercial establishments in the Town of Babylon were collected by private contractors and transported to municipal landfills, which were open pits operated alone or in conjunction with incinerators. As Long Island's population increased, the landfills reached their capacity municipalities began to alleviate the excess trash

problems within their jurisdictions by [8] restricting who could dump waste within the muncipalities or by exporting refuse. The results were disastrous and environmentally unsound, as demonstrated by the floating trash barge a few years ago, which was wandering around the North and South American Continents looking for a home.

In an effort to rectify the trash crises, the New York State Legislature adopted Chapter 299 of the Laws of the 1993, which required a restructuring of solid waste management and disposal methods. Chapter 299 prohibited the development of new landfills and encouraged, not required, resource recovery and recycling schemes. In furtherance of Chapter 299, municipalities adopted ordinances to create local waste management programs. These programs required the acquisition of land and the construction of resource recovery and recycling facilities.

In 1985 the State Legislature authorized the Town of Babylon to adopt a local law for the management of solid waste. Pursuant to that legislation, Chapter 478 of the Laws of 1985, Babylon entered into agreements with Ogden Martin Systems, (Ogden), to produce a special plant called Resource Recovery Facility, to ensure that the town delivered 225,000 tons of municipal solid waste for a period of 20 years and to pay certain fees covering [9] the construction costs of the facility. To finance this waste management program, Babylon issued municipal bonds and committed revenues from the waste management system to cover the debt and debt service. The town agreed to pay service fees to Ogden which were to be financed from receipts of taxes, user dumping fees and tipping fees.

In 1986 Babylon established a residential garbage district pursuant to the waste management program. In 1990 the town commissioned a study of the collection of commercial solid waste which concluded that commercial waste collection was overpriced and inefficient and suggested that the town create a commercial refuse district

similar to the residential garbage district. The provision at issue is Babylon's attempt to follow the recommendations of the 1990 study.

The town plan envisaged that it would enter into an exclusive contract with a private contractor to collect all the refuse in that commercial garbage district. Pursuant to that plan, Babylon initiated a public competitive bidding process, open to all trash carters in and out of the state and in and out of the town and received four bids. The Babylon Source Separation Commercial, Inc., the BSSCI, was the successful bidder.

The final contract provided BSSCI to deliver the [10] waste collected within the district to the town designated facility or to an alternate facility of its own choice. However, the contract gave BSSCI not only a powerful, but virtually an irresistible incentive to dispose of the waste at the town facility as BSSCI could deliver the first 96,000 tons of waste to the town facility free of charge.

Now, given that background, and I am sure one or more of you will correct my statement of background facts, if it is and I am perfectly willing to accept virtually that it can be backed up.

I want to look at this Carbone decision. And those of who you have copies of 114 Supreme Court, could follow it along. Put those copies in front of you. I have a Xerox copy myself of the Supreme Court decision. This is not the official version. This is the Westlaw published version.

Beginning, then, with majority decision, headed note 1 of page 1681, the Court says:

At the outset we can confirm that the flow control ordinance does regulate interstate despite the town's position to the contrary.

Then it goes on. And the middle of the next paragraph it says two things:

By requiring Carbone to send the non-recyclable [11] portion of this waste to the Route 303 transfer station

at an additional cost, the flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste.

Then significantly:

Furthermore, even as to waste originant—I think they meant originating, but I am not going to correct their grammar—originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step.

The collection step.

The ordinance thus deprives out-of-state businesses of access to a local market. These—and I emphasize the word these, because that's two factors.

These economic effects are more than enough to bring the Clarkstown ordinance within the purview of the commerce clause. It is well settled that actions are within the domain of the commerce clause if they burden the interstate commerce or impede its free flow.

So they start from that hypothesis, and then on the next page, in footnote 2, they say:

The real question is whether the flow control ordinance is valid despite its undoubted effect on interstate commerce. For this inquiry, our case law yields two lines of analysis. First, whether the [12] ordinance discriminates against interstate commerce; and second, whether the ordinance imposes a burden on interstate commerce that is quote, clearly excessive in relation to the putative local benefits.

And then they say something that I am not entirely sure it's what they mean in the light of what develops. It says:

As we find that the ordinance discriminates against interstate commerce, we need not resort to the Pike test.

Now, in a couple of other paragraphs they say:

With respect to this stream of commerce, the flow control ordinance discriminates for it allows—allows is the key word there—only the favored operator to process waste that is within the limits of the town.

Now, you can almost see the editing hand here. The next sentence, I think is in reply to Justice O'Connor's comment about the equal—if everybody has an equal shot, as everybody in here with respect to the collection process, then it's not discriminatory, says Justice O'Connor.

But they say:

The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.

[13] The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition. It's almost as if they wrote that after they wrote this opinion and stuck it in there in reply to her statement, which, when you read it, makes a lot of common sense. But they are saying it doesn't make any difference in view of the five justices who came down with this analysis.

And then they go on. And then as if to reply—I am not sure where this—this to me makes more—this next part makes more sense with respect to the second portion, the second question which I say they don't address, but I think they address it here.

How they get it under discrimination, I am not quite sure. They say after analyzing the cases:

The essential vice in laws of this sort is that they bar the import of the processing service.

Naming the importation of the processing service.

Out-of-state meat inspectors, or shrimp hullers, or milk pasteurizers, are deprived of access to local demand for their services. Put another way, the offending local laws hoard a local resource—be it meat, shrimp, or milk—for the benefit of local businesses that treat it.

[14] That's the second half of Justice O'Connor's opinion. You will find that she used virtually that same language. But she's dealing with the second question, not the first, not the discriminatory—the second question. This looks like it was also added to the discriminatory analysis. I'm not quite sure why.

Then they go on to say:

The flow control ordinance has the same design and effect.

Now those words are very important here. The flow control ordinance has the same design and effect.

As I read that sentence, which is sort of a conclusionary sentence, but what they are saying is, this ordinance at issue here has the same design as the one in Carbone. And in effect, notwithstanding the fact that you provided the alternative for the disposal of the Carters' will, because the effect is—where you give the tremendous discount is to require them to use the town facility.

It hoards solid waste, and the demand to get rid of it for the benefit of the processing facility. The only conceivable distinction from the cases cited above is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute. In [15] Dean Milk, the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out-of-state pasteurizer who wanted access to that market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here—and this is language that they both, Justice O'Connor and the majority agree upon—the flow control ordinance at issue here squelches competition in the waste processing service altogether, leaving no room for investment from outside.

Justice O'Connor uses that language, if you examine her opinion carefully, to support her statement that she rests her opinion on the second test, whether the ordinance imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits.

How that falls into the discrimination analysis, I am not quite sure. I think they may be going over it and sort of saying, well, we agree with her on this part as well, but they don't say it.

Now the next two paragraphs down are important here because one of the things that's been bothering me,

and has bothered me since you all show showed up here, and one of the reasons that I—were I writing on a clean slate is that I find it very difficult to take away [16] what from the municipality, town, village, city the right to look after the collection of the garbage of its citizens, the residents and businesses, for fear that if they don't do it adequately, they will not have lived up to their sworn duty to protect the people, the citizens and so forth, from possible disease, plague and what else.

But they answered that question by saying:

The teaching of our cases is that these arguments must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem. The commerce clause presumes a national market free from local legislation that discriminates in favor of local interests.

And they make this comment which may or may not be so, but we have to accept:

Here, Clarkstown has any number of non-discriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question. The most obvious would be uniform safety regulations enacted without the object to discriminate. The regulations would ensure that competitors like Carbone do not underprice the market by cutting corners on environmental safety.

[17] And then they go on with their conclusion on the next page:

Though the Clarkstown ordinance may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its practical effect—they changed the wording—by its practical effect—it's almost as if they are writing it for this case—and design.

They are putting the emphasis on the effect, not just what it was designed to do. In haec verba, as we say.

I think I have said enough about Mrs. Justice O'Connor's analysis and have called your attention to what I

think is very important. But I think I—oh, particularly the town—a response to my own inquiries, which still bother me, but I think—I am assuming, and this is inevitably the case, that the majority read the dissent before they reached their conclusion.

Mr. Justice Souter, together with Chief Justice Rehnquist, and Justice Blackmun, say at the outset of their opinion:

What the majority ignores, however, are the differences between our local processing cases and this one: the exclusion worked by the Clarkstown's Local Law 9 bestows no benefit on a class of local private actors, [18] but instead directly aids the government in satisfying a tradition governmental responsibility.

Then they point out, I think with some justification:

The town has found a way to finance a public improvement not by transferring its cost to out-of-state economic interests, but by spreading it among the local generators of trash, an equitable result with tendencies that should not disturb the commerce clause and should not be disturbed by us.

Then later on they say, with some—in support of what I was trying to suggest to all of you a couple of days ago, which I thought was a very strong factor:

Second, the one proprietor so favored is essentially an agent of the municipal government, which, unlike Carbone or other private trash processors, must ensure the removal of waste according to acceptable standards of public health. Any discrimination work by Local Law 9 thus fails to produce this sort of entrepreneurial favoritism we have previously defined and condemned as protectionist.

But notwithstanding that, the majority rejected that.

The majority recognizes, but discounts this difference between laws favoring all local actors and [19] this law favoring a single municipal one. According to the majority, this difference just makes the protectionist effect of the ordinance more acute because outside investors

cannot even build competing for facilities within Clarkstown. But of course Clarkstown investors face the same prohibition, which is to say, that Local Law 9's exclusion of outside capital is part of a broader exclusion of private capital, not a discrimination against out-of-state investors as such.

Justice O'Connor's argument again. And they pointed out again the second time, the majority, the majority doesn't buy it.

The majority ignores this distinction between public and private enterprises, equating Local Law 9's hoarding of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms.

I point out those—what I think are very salient statements to explain to you the reason why I think my hands are bound as a matter of law to reach any conclusion other than a—certainly in the case of the disposal effect of the—or this disposal unit setup with the discount, particularly with the discount. If the discount were not here, then the alternative was [20] there. With the disposal unit there wouldn't be a problem, as I see exists here and in Carbone.

And I go back to what I said at the start of my discussion, whether in the light of what I have highlighted for you here, and particularly the rejection, not once, but twice of the analysis, what I call Justice O'Connor's analysis, that as long as everybody had a shot at—an equal shot at the bidding, then you can't say there was discrimination in the selection of a collector.

The majority not only rejected that, but the dissenters recognized it. They said, well, it's not that. It's the denial of the access to come in and work with the waste generators that constitutes the discrimination. It is not the question of they having had a right to bid or not. That is the way I read it.

And I don't think the—I haven't really have a—doubts in the light that lasts when you even succeed on the collector portion.

So, what I propose to do is grant the motion for injunction, notwithstanding the fact that I don't think irreparable harm has been shown. Because I think on my reading of the Carbone case, in any event as a matter of law and it's virtually the equivalent of granting a permanent injunction at this point, is that matter—[21] that that matter of law has got to be overturned, in my book, to not require me to maintain the status quo.

However, having said that, since we are still in the—unless everybody can agree to turn it into a permanent injunction, taking it on that issue, I think I must discuss with both sides an appropriate bond pending the ultimate resolution of this question.

MR. AMOROSO: Your Honor, if I may, under—

THE COURT: I should add one thing. Before the Second Circuit says, if you turn this into a summary judgment motion, don't you remember United States against Blassingame where we beat you over the head because we told you not to do that without having given both sides an opportunity to be fully on heard on it?

That's why I am still leaving it in the preliminary injunction stage.

MR. AMOROSO: Well, your Honor—

THE COURT: I think from a legal standpoint, we have everything that we need to decide the legal question that I have set forth my views on or set forth the Supreme Court's views on.

MR. AMOROSO: Well, your Honor, with all due respect, I think the Court ignored the third from last paragraph in the majority, that I highlighted in my argument, that in the Carbone case, the town elected to [22] go into the open market for its revenue in this case and Babylon went to its taxpayers.

And I think that is an extremely significant aspect of the majority decision that the Court did not highlight and I respectfully suggest—

THE COURT: I don't think it's controlling.

MR. AMOROSO: Secondly, with regard to the argument that we had posed and would hope to propose on

the motion to dismiss, that what the Court is doing by granting a preliminary injunction here directly interferes with the Town of Babylon's taxing ability and taxing authority, and, therefore, is contrary to the Anti-injunction Act, 28 U.S.C., 1341, because the town has collected tax on the basis that it is a benefit assessment. And not being able to confer the benefit, the town cannot keep the tax.

And I respectfully suggest that the District Court does not have jurisdiction to interfere with the town's taxing ability. And that is exactly what your Honor's determination is doing.

THE COURT: All I'm doing, as I see it, is following what the Supreme Court told me to. If the net effect here has the result that you—and if I am wrong, then it's because you when you agreed—when you adopted this ordinance, it did not follow what I perceive to be [23] the instructions of the Supreme Court. It has nothing to do with taxing.

MR. AMOROSO: Well, your Honor, in light of the fact that there is an 18.9 million dollar budget for 1995—

THE COURT: That's a question that you can—if you can persuade the Second Circuit that this decision having come down in May of 1994, that it's the Court's fault for trying to follow this and it is not your fault for not following it as I read it—bully for you.

But I don't think I have that choice.

MR. AMOROSO: Well, your Honor, what I am addressing now is the amount of the undertaking.

THE COURT: Oh.

MR. AMOROSO: And I would submit that given an 18.9 million dollar budget and roughly one and a half million dollars per month, the likelihood that this matter would take four or five months to go through the Second Circuit process, we would ask for an undertaking of at least seven to ten million dollars.

THE COURT: Oh, I don't think that is even partially realistic.

I mean I understand what you're saying to me, but I think what you're going to have to do is to seek an expeditious review. If I felt otherwise, I would have [24] taken the time to write a perfected opinion here, not just give it to you from the bench, but I realize the urgency and I have attempted to resolve this whole thing in what amounts to really less than a week.

MR. AMOROSO: I appreciate that, your Honor, and I would also ask that the Court stay the determination pending our appeal to the Second Circuit.

THE COURT: Well, I can suspend my determination, but I have to preserve the status quo, as I see it. The status quo, as I see it, is not going to harm any of the plaintiffs and it will be in effect a minimal amount of harm to the town. And it puts a burden on the town in getting a very fast review.

MR. AMOROSO: Well, I believe procedurally I am required to ask that you stay the preliminary injunction determination pending appeal.

THE COURT: Yes, and I will deny that at the moment.

MR. AMOROSO: Thank you, your Honor.

MR. CORE: Your Honor, may I be heard on the undertaking?

THE COURT: Yes.

MR. CORE: Your Honor, before I get into the undertaking, just one observation with regard to your Honor's decision, and what I believe Carbone talked [25] about, the processing, your Honor. It did not speak of collection. It spoke of that intermediate processing which BSSCi did have under negotiation in contract with an outside party. That would be outside the scheme of disposal.

THE COURT: As a technical matter you are 100 percent right, Mr. Core. That other issue was not before them. The collection issue was not before them.

But if you read the language that they used and if you read the—if you read it the way I do, the language

of Justice O'Connor, since she in effect was saying just what you're saying, there is no discrimination here with respect to collections, she says. Because she says, everybody within and without the town had the same right to collect. So they're wrong, she says, with respect to collection.

But, you remember when I said they snuck in this sentence, which it allows only the favored operator to process waste that was within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processes are also covered by the prohibition.

MR. CORE: Your Honor, with regard to that processing, that is not anything that the town has made a favored or will have a positive effect on, because that's [26] probably—

THE COURT: Mr. Core, you may be right. It's dictum the way I read it. The way I read it, it's unquestionably dictum. That problem was not presented to them and they—frankly, if it gets up there again they may say, oh, we never meant that. And they may say, Platt is just all wrong.

But I find it very hard to get around it.

MR. CORE: Then, your Honor, let me go to the undertaking.

Your Honor, you have the preserving of the status quo in effect would be an injunction requiring an undertaking. I believe that that is clear.

Your Honor, although I have problems with you doing this outside your finding of no irreparable harm, going into the merits of the dollar amount on the undertaking, your Honor, from a BSSCI standpoint, two million dollars of money have been allocated to equipment that is in, that is paid for and subcontracted to be paid for. That is completely outside the town's request, your Honor.

So, in addition to what the town is saying, that their million dollars worth of damages, we have, and what we can demonstrate, is two million dollars worth of damages, your Honor.

[27] In addition, I believe that it ultimately, if the merits go in favor of the defendants, your Honor, the defendants will have no recourse but for to look toward the undertaking.

So I plead though, respectfully ask your Honor that an undertaking be set.

Your Honor, the town obviously has substantial damages. The other defendant BSSCI, we can enumerate two million dollars worth of damages.

And we ask your Honor, respectfully, to set an undertaking over—substantially over that amount.

THE COURT: Miss Christian, what do I do about this undertaking? It kept me awake nights. I don't know.

MS. CHRISTIAN: Your Honor—

THE COURT: What they say is true. And also what they say is true, too, as Mr. Core says is true.

I have a situation where there is no way I can justify the finding that there is irreparable harm here.

MS. CHRISTIAN: Your Honor, we would submit that any undertaking should be minimal.

First, let me look at the situation with respect to the town. In the affidavit provided by Mr. Jacobs, the comptroller, he says two thing that I think are highly significant here.

[28] First, he makes the statement that the $65.00 tipping fee presently charged by the Ogden Martin Facility, at the direction of the town, is competitive.

Now if it's competitive, they should not have any difficulty in getting enough trash to more than meet their obligation.

He, in fact, goes on to make the statement that they have arrangements with a local hospital authority to take medical waste at $240.00 per ton, which is way above the normal tipping fee. And that in fact they are turning other waste away when they get the chance to get this medical waste.

He also states that there is more waste on Long Island that could possibly be handled.

Now, if all of these statements are true, the town is not going to face any loss whatsoever during the pendency of this preliminary injunction.

So we would suggest that the town itself has shown no need whatsoever for any injunction, and that beyond that, they have affirmatively shown by their own statement that they aren't going to have any damages.

With respect to BSSCI, they have given no specifics whatsoever. We know from their papers that they are subcontracting a great deal of the work. They don't tell us how much. They have given us no specifics [29] with respect to what they expect their monthly profit to be. They've only given us some gross figures. They have simply shown nothing specific enough to justify any undertaking.

In addition, I note that the contract between the town and BSSCI includes a provision that the maximum damages would be only $250,000. It contains another provision providing that a reason for not going forward with the—a reason that either party can decide not to go forward with the contract is the existence of litigation challenging the validity of the contract.

So in this situation, your Honor, I understand you have already decided that there should be an undertaking—

THE COURT: I have to. I must under the law.

MS. CHRISTIAN: I understand, Your Honor. I am not going to—

THE COURT: It's not what I decide. It's the law that requires that I do it.

MS. CHRISTIAN: I understand, your Honor.

So I'm not going to argue that there should be none at all.

THE COURT: I mean I—

MS. CHRISTIAN: I will simply argue—

THE COURT: I won't say that I've given a free [30] ride, the town has acquiesced to my giving you a free ride. They could have compelled me from December 31st to put up an undertaking up until now.

MS. CHRISTIAN: I agree, your Honor, and I'm not asking for no undertaking.

I am suggesting that they have made a very weak showing and that the undertaking should be accordingly minimal.

THE COURT: Well, I don't think they've made a very weak showing.

You know, these things are not fluid. It's probably the wrong word to use in a case of garbage or waste. But they are. And nobody knows for sure what ultimately these nine people meant. Certainly with respect to the collection portion of the problem, there is a real doubt. And even with respect to the disposal part of the problem.

This is not a rubber stamp of Clarkstown. I think it's sufficiently familiar in design in effect that I have to follow it.

MS. CHRISTIAN: I come back, your Honor, to the concept that the undertaking should reflect the injury that may be sustained by the town and by BSSCI. And the fact that their own papers that they have filed in this case simply do not show any serious injury.

[31] The town in particular, it's own assessment indicates that it's going to be readily able to meet its obligation to Ogden Martin and that, indeed, there is probably more waste right on Long Island than they are able to handle.

THE COURT: Well, let me put it to you from the standpoint of BSSCI, as I see it.

They have already incurred a substantial quantity of expense. They may have stipulated. I'm not quite sure. I sort of like to have Mr. Core's and the town's view on what effect the liquidated damages are. There haven't been any on this picture.

As I see it, I think just my stomach reaction, and then I am going to take a little later this afternoon to think about it further after I hear further from them, but I

think you're going to have to put up a fairly substantial bond. Whether it be a hundred thousand, two hundred thousand, five hundred thousand, or a million or more, I am not prepared to say.

I think—I don't know who your collective clients are, but I think maybe during the lunch hour you ought to discuss with them what is within the realm of probability.

MS. CHRISTIAN: Good advice.

THE COURT: It may be that—it may be that you [32] can't afford this. It may be. I am going to have to, pending the appeal and the ultimate outcome here, say you can't afford it. And you can't have the injunction without a bond if you can't afford it. I don't know.

But I would like to get the town's and Mr. Core's view on the liquidate damage aspect.

MR. CORE: Your Honor—

THE COURT: I have to give him a chance.

MR. EISENBUD: Thank you, Judge.

Your Honor, I would hope that we could have some sort of at least a mini-hearing here to look at what the town's damages might and BSCCI's. For example, BSCCI has indicated a number of times that it is subcontracting out a lot of the work. If that is covered by other people with their existing equipment, I don't know where their two million dollars comes from.

In addition, does the two million dollars include damages for the mobilization and then demobilization in December when they put all their containers out and pulled them all back, after your Honor set a hearing for the 30th and then your Honor said the contract was stayed.

That was before the contract went into effect. Does that—are those costs included?

We don't know.

[33] THE COURT: You know what I suggested to you, rather than holding a mini-hearing, is you each talk to your respective clients and then maybe have a discussion between yourselves and see what is—what are the

parameters of the doables in your mind, and then maybe we have a further discussion this afternoon on it.

But this is a—this is not a small undertaking. This has a—to compel them to go on beyond the month is undoubtedly having a financial impact on the town.

MR. EISENBUD: But if I could address that, I—

THE COURT: Rightly or wrongly. I know you think you're right and they think they are right. You have to try and not be so partisan.

MR. EISENBUD: No, no, I'm not. I'm trying to address their claim of—

THE COURT: I think before you address their claim we get their view on their claim and then maybe you discuss it with them and see if you can't resolve something between yourselves rather than leave it up to me. You might come to a more intelligent conclusion.

MR. AMOROSO: Your Honor, I would like to take your Honor's suggestion that we talk about it during lunch and marshall our presentation with respect to that.

I would just point out that—

[34] THE COURT: I am interested in yours and Mr. Core's view on this liquidated damage question. If all we are talking about is two hundred and fifty thousand dollars of liquidated damages, maybe that is all your responsibility to them is, forgetting about your responsibility to the town at this point.

I don't know. I don't know what—I want you to sort of come back here with affirmative answers to questions like that.

MR. AMOROSO: Yes, your Honor.

THE COURT: Unless you settle the whole thing between yourselves.

MR. AMOROSO: I would also just like to bring to the Court's attention that despite the prevalence of solid waste on Long Island, since your Honor suspended the contract, the amount of MSW going to that facility has dropped precipitously and I think perhaps punitively because the plaintiffs emphasized, well, we are going some-

place else. And the town has suffered significant loss of revenues in the fact that it has not been able to receive the municipal solid waste even though the price is competitive.

So I would close with that thought and appreciate the opportunity to confer with my client and then co-defendant.

[35] THE COURT: I think the time will be well spent.

Now I have the Lockerbie case coming in here at 2:00, Miss Giangarra?

THE CLERK: Yes.

THE COURT: I don't think we are going to be too long. But I have got problems with them still and I do—I scheduled them for 2:00 o'clock, thinking we would be done. But I will pick you up I would guess around 2:30. I won't be much more than a half-hour with them, I don't think. But be patient with me if I am.

MR. AMOROSO: Thank you.

THE COURT: They have problems, too.

(Luncheon recess.)

[36]

AFTERNOON SESSION

THE COURT: All right. What did we agree upon, if anything?

MR. CORE: Your Honor, may I address the Court before we get to the undertaking?

THE COURT: About what?

MR. CORE: Your Honor, if I may?

THE COURT: Yes.

THE COURT: I may shut you down.

MR. CORE: Thank you for the opportunity, your Honor.

Your Honor, it seems that through your decision, the disposal aspect of this contract that gives you the most trouble. In fact that was at the outset—

THE COURT: Only because it sounds virtually on all fours with the Carbone case.

MR. CORE: Your Honor, to be honest, the district did not want to include the disposal in the manner that plaintiffs have present.

Your Honor, the defendants have a suggestion and we want to know if your Honor would give us a period of time. We would like to amend the contract, your Honor, to give the contractor the opportunity to pay for the disposal itself without any other strings, without any other reason to bring it anywhere, your Honor, because [37] that was the original intent of the district.

And I believe that if we do that and we modify the contract, your Honor, we take it out completely from the Carbone arena, as I believe this contract is outside that arena, but plaintiffs have successfully tried to bring it in, your Honor.

THE COURT: They didn't try to bring it in. They didn't put this discount in there. You did.

MR. CORE: Well, your Honor—

THE COURT: You didn't. The town did.

MR. CORE: And, your Honor, now we may have an agreement with the town to take that discount out and pay full value of the service of disposal.

THE COURT: Well, look, I've told you what I thought the Supreme Court was saying. Whether the—whether the Court of Appeals and the Supreme Court go around and give it to you—it's very hard to get to the Supreme Court because they have so much to do, and they really do.

As I understand the rationality, Mr. Core, it is the denial of access. And I think if you poll Miss Christian's mind, she's going to tell you that that's the thrust of her complaint. And the thrust of their complaint is that there is a denial of access not only to the disposal step, if I may use that word. They use the [38] word step. But also to the collection step.

Now, as I said this morning, if I were writing on a clean slate, I would go along with Justice O'Connor. I think she's got the right idea.

But I think that that sentence in there wasn't put in there just for the sake of seeing it in there in the majority opinion.

MR. CORE: But, your Honor, again dealing with the Carbone decision and dealing with that disposal aspect, obviously the interstate commerce market would be on the processing and disposal of the material.

THE COURT: I am not arguing the point with you. All I am saying, Mr. Core, is that I am having a great deal of difficulty with the sentence, with respect to the stream of commerce, that flow control ordinance, the discrimination that allows only the favored operator to process waste within the limits of the town.

The ordinance is no less discriminatory because in-state or in-town processors are also covered by the this prohibition.

MR. CORE: Well, your Honor—

THE COURT: Now that doesn't necessarily fit in there, except in answer to Miss Justice O'Connor where she says, because in-town processors like petitioner and out-of-town processors are treated equally, I cannot [39] agree that Local Law 9 discriminates against interstate commerce.

Those two statements, I think you—when I read that and I went back and I said, why did they put that in there?

And I read this. And I think that is what they are saying here.

MR. CORE: Well, your Honor, by allowing the town and BSSCI to amend the contract, that puts disposal right into the stream of commerce. And I believe—

THE COURT: Oh, no question about it. But I don't know what she's going to say. But I suspect what she's going to say is the simple denial of access to the caters to—under their interpretation.

And under your interpretation and perhaps mine, if I were writing on a clean slate, it is not a denial because everybody has access by the right to bid. But they don't—

MR. CORE: Exactly.

THE COURT: But they don't look at it that way.

MR. CORE: It's a non-discriminatory alternative, your Honor.

THE COURT: I know you say it's not, and maybe Justice O'Connor is right, but five other justices disagree with her, seemingly.

[40] MR. CORE: Again, your Honor, I would welcome the opportunity of having plaintiff counsel address that if your Honor—

THE COURT: Well, I don't want to do such. Why don't you talk to her about it?

MR. CORE: Your Honor, then may I go on to the undertaking?

THE COURT: Yes.

MR. CORE: Thank you, your Honor.

THE COURT: I mean any way you guys can settle this one case, it's 201 for me and then I am down to 200.

MR. CORE: Your Honor, I have a brief presentation. My presentation on the undertaking, your Honor, goes specifically to the injunctive relief and the status quo. As your Honor is well aware, the undertaking is to compensate defendants in the event that the defendants are ultimately victorious, your Honor.

With regard to damages, the defendant BSSCI can only look to the town for damages. Outside the defendant's table, your Honor, we can look no further. And that's the essence of the undertaking, your Honor. Because the defendant table can look no further.

We polled three of the eight subcontractors engaged in this project. And I will give you the hard facts and dollars amounts, your Honor, as to what has [41] gone on in the last few most with allocations and money.

First, I would like to address the demobilization.

THE COURT: Well, I would like to ask you this question that I asked this morning. What is the liquidated damage between you and the town in the event they cancel?

They are compelled to cancel, not voluntarily.

MR. CORE: Your Honor, there is no liquidated damages. What plaintiff counsel pointed to on page 6 of the contract was the demobilization cost. Your Honor, that was only for the physically—the physical removing of containers from the property.

And, your Honor, that was capped 250,000. But to be quite frank, your Honor, that's already been done that's already been triggered by your Honor's status quo decision of December 30, 1994, your Honor.

And that fee was a fee that only—if you look on page 6, the definition of demobilization, your Honor, it says specifically for the physical removal of contractor's containers.

Well, your Honor, damages by this contract go far beyond just the removal of containers, your Honor. And I can get into that.

THE COURT: No, no. I get your point.

[42] The second point is, is there no—is there no escape clause for cancelation due beyond the control of the contracting parties—acts of God, acts of federal judges?

I shouldn't equate the two. But whatever it may be.

MR. CORE: Your Honor, if you give me a moment so I can go through this list, I will look and address that to you directly. It is a lengthy contract, your Honor. Obviously this litigation was never entirely contemplated.

THE COURT: You never thought you were going to run into problems when you are dealing with a case of this type?

MR. CORE: Well, your Honor, I believe the litigation—I think your Honor would agree that the litigation has been unprecedented.

THE COURT: Well, even I was aware of this problem last summer when Smithtown walked in. And you

guys must have been aware because you have been in front of Judge Tannenbaum when he had the proceedings before that, as I recall.

When did you start before Judge Tannenbaum?

MR. CORE: That didn't start until after—

MR. AMOROSO: November.

[43] MR. CORE: November 10, your Honor.

THE COURT: Well, Smithtown should have been enough of an alert to all of you. They were in here in July I guess.

MR. CORE: Well, Judge, again, it is not only this action in this courtroom, but the multitude of other actions that came—

THE COURT: All the more reason.

MR. CORE: Your Honor, with regard to BSSCI and money, your Honor, the contract mandated that we purchase new trucks, new containers, new equipment, your Honor. And that's all been done.

Right now, those containers are—and there are thousands in number, are stationed in various yards, your Honor.

With regard to equipment that BSSCI had purchased with regard to the phone, the computer billing system, the office furniture, the setting up of personnel, that amount was in the number of fifty-four thousand dollars.

With regard to subcontractors, your Honor, with the amount of containers purchased new, with the amount of equipment, and again, your Honor, this is only three out of the eight subcontractors, they have spent a total of seven hundred and twenty thousand dollars, your Honor [44] in new equipment.

Your Honor, with regard to—now that was with regard to containers, your Honor.

The vehicles, the trucks that they purchased, and again, as I made the presentation to this Court, the trucks and the containers were specifically for Babylon. They were painted. They were lettered. They were tailored to Babylon's specifications, your Honor. And that has all been done with regard to these pieces of equipment.

The vehicles in question are nine hundred and fifteen thousand dollars, your Honor.

With regard to customation and set up of equipment, seventy-five thousand.

Judge, that equipment number is one million seven hundred and sixty-four thousand dollars.

Judge, we have calculated the storage cost of the containers. It takes multiple acres to store these containers outside. It would be cost prohibited to store them inside. We calculated that storage cost of twenty-five thousand per month and we have done that for a ten-month period, two hundred and fifty thousand dollars.

In addition to that, Judge, we calculated loss profits to be at twenty-five thousand dollars per [45] district, two hundred thousand dollars per month. And again, Judge, a ten-month period, to be two million dollars.

So plaintiff BSSCI, your Honor, has calculated calendar four million fourteen thousand dollars in costs.

Your Honor, that does not include demobilization two hundred and fifty thousand that was inevitable through your December 30, 1994 order. And I believe that the ten-month period would also include that month that we've already been damaged.

Judge, you're absolutely right. We could have come here and we could have asked for an undertaking. And I believe in the latter part of the record of your decision you made mention to my request for an undertaking back on that status quo decision, your Honor.

Judge, this is imperative. Again, outside of defendant's table we can look no further. And an undertaking would be imperative that one be given.

Your Honor, respectfully defendant BSSCI asks for an undertaking of four million dollars for its portion of damages, your Honor.

Thank you.

THE COURT: Let me ask you something before you [46] sit down.

MR. CORE: Yes, your Honor.

THE COURT: Have you made any efforts to talk with during the noon hour to the plaintiffs to determine as a practical matter what they could post?

MR. CORE: Your Honor, the town had taken liberty to speak with them. Plaintiffs had asked that they speak to the defendants separately.

Yes, I was the next go around, Judge, and that didn't happen. But we will be willing to speak to them.

Otherwise, your Honor, these amounts are not fictitious. They are cast in stone. In fact, if we're victorious I would imagine the Court would mandate we prove all of them before we can go and get the undertaking, your Honor.

So I don't see—I would again discuss, under your Honor's direction, any movement from that number. Maybe the defendant town may enlighten you further about those negotiations.

THE COURT: All right.

MR. CORE: Thank you, your Honor.

MR. AMOROSO: Your Honor, during the lunch break we had the opportunity to bring the comptroller of the town to my office and spoke with him at length. He's here and he's prepared to testify to the figures and [47] numbers that I am about to advise the Court about.

In a way, it really goes to prove my point. But before I get into that, the entire budget for the commercial garbage district is 18.9 million dollars. That is what the town has to pay for the portion of the system that's attributable to the commercial establishment. The system includes the incinerator, the ash fill, recycling program, payments on the capping of the hazardous waste landfill.

So that 18.9 million dollars is what the Town of Babylon has to pay in this year, in 1995.

Out of that, 5.4 million dollars was allocated for BSSCI. That is what we were going to pay them. So now we don't to have pay that, assuming that the contractor is thrown out for the entire year.

Out of that, we have to pay 4.1 million to Ogden Martin pursuant to the service agreement with Ogden

Martin. And that 4.1 includes the payments on the 1985 bond.

In addition, we have miscellaneous costs for monitors and landfill equipment and things of that sort of 3.8 million dollars.

And then there is a payment of 3.8, another 3.8 million dollars for the general obligation bond from the 1993 bond for the waste system that Babylon that has [48] incorporated.

If we subtract the 5.4 million dollars that we don't have to pay BSSCI, it's still 13.5 million dollars. If we operate at 96,000 tons, at $65.00 per ton, that will net to the town 6.6 million dollars. And the town believes that's a competitive fee and that we will be able to get that tipping fee, and hopefully we will be able to get the 96,000 tons.

You subtract that 6.2 million dollars in revenue from the 13.5, we have a short fall of 7.3 million. That is what the town, for want of a better term, was to profit from this system to use to pay for the cost of this entire system. That's the tax that is involved here.

And the way that came about, your Honor, and one of the other ways to look at is, is that the town has imposed the benefit assessment on the commercial establishment. Above that benefit assessment, the town was going to receive $9.35 per cubic yard collected above the basic service.

We only had to pay BSSCI $3.21. So out of that, in that 975 is a tax to the town, that the town would receive of $6.54.

So if you look at it from that direction, it comes out to 7.3 million. If you look at it from the [49] other direction, taking it from the total and subtracting the component, it comes out to 7.3 million in 1995.

And I went over it extensively with the comptroller, as we have several weeks now, and that is the amount that the town stands to lose by virtue of the preliminary injunction.

And would ask that an undertaking in that amount be assessed.

THE COURT: Have you conducted any negotiations with the plaintiffs?

Of course, I don't know what the plaintiffs' situation is. I don't know how many carters we are dealing with, what kind of money they could generate, if any.

But my question, as a practical matter, have you been over this ground?

MR. AMOROSO: Your Honor, I explained it to the plaintiffs, and before we could get into any meaningful response, we were advised to come in here. But I told them that—

THE COURT: Well, in other words, you are not through with your discussions?

MR. AMOROSO: That's right, your Honor.

THE COURT: Well, I don't know whether Miss Christian wants to address me before she conducts [50] discussion or not.

If you would like to go out and talk to—talk common sense to Miss Christian, you're welcome to do so, but—

MS. CHRISTIAN: We would be happy to attempt to talk further, your Honor. We were in the process of beginning discussion at the time your Honor advised you were ready.

THE COURT: Well, I certainly don't want—I am sorry I interrupted you.

I think as a practical matter that's the way at least to go about it initially. I think they have tossed a small slice of pie on the table, which might provide at least what I call a structured type settlement. Maybe a year here with a piece of pie, next year with another pice of pie, and next year another piece of pie, and three years down the road resolution of all other problems to everybody's satisfaction, might be a way of approaching something.

But I don't know how. I am no expert in this field.

MS. CHRISTIAN: Your Honor, I might say that what we on the plaintiff's side have been attempting to work out with respect to the town is an agreement among the carters who are plaintiffs in the case, plus the [51] additional carters that Mr. Goldstein has been talking to, by which they would be willing to make a commitment to this Court that as long as the tipping fee remains $65.00 a ton, that each of those carters would promise the Court that they would continue to take the amount of trash to the town facility that they took last year. And we—

THE COURT: Well, I don't want—I really don't want to get into the nitty-gritty of it. It would take me too long to catch up to speed and maybe in addition in discussing it as a practical matter what you are able to put up and what you're able to otherwise work out, something might come out of it.

MS. CHRISTIAN: I would hope so, your Honor.

THE COURT: Why don't you take a little more time?

I think the courtroom across the hall is vacant if you want to use it.

MS. CHRISTIAN: Thank you, your Honor.

MR. CORE: Thank you, your Honor.

(Recess taken.)

[52] THE COURT: Have you progressed anywhere? I guess the ball is in your court.

MS. CHRISTIAN: We certainly have been talking, your Honor. We have not been able to reach agreement on the amounts, but we have been engaged in discussion.

If it is acceptable to your Honor, I think we might explain what we have proposed, which is something that we think is reasonable and appropriate in this case and would be an appropriate bond, and then let the other side respond unless you have a different approach.

THE COURT: No. I would like to know where we are.

MS. CHRISTIAN: With respect to BSSCI, first of all, your Honor, we believe that the appropriate amount of bond for BSSCI would be termination fee, which is found in the BSSCI contract with the town. That is on page 12 of the Town/BSSCI agreement, and it provides for a termination fee, of which would be the sum of the demobilization cost, which is what Mr. Core stated to you was two hundred and fifty thousand dollars, plus capital costs for equipment as of the commencement date, and it goes through another—some other added factors, but in no even shall the termination fee exceed two hundred and fifty dollars.

We believe that that is an appropriate amount, [53] and since it is an amount that was agreed to by BSSCI itself, and we would be prepared to post the bond in favor of BSSCI of two hundred and fifty thousand.

Now, turning in particular to the various elements of damage that BSSCI claims, first of all, they have claimed—and if you want exact numbers, I may have to have my colleague, Mr. Hassler, to help me out on it.

They have claimed a total of four million dollars in costs. But when you look at it, this includes, for example, fifty-four thousand dollars for office equipment, seven hundred and twenty thousand of other new equipment, nine hundred thousand dollars for vehicles.

Your Honor, there is no possibility that these would be rendered worthless. At most, vehicles—these are trucks that could be sold for at least 90 percent of their value.

The equipment that—such as containers, I am told, could be sold for at least 75 percent of their value.

So that these numbers are greatly inflated. We can go into more detail on that if it's necessary.

But when you look at the amount that goes into this four million dollars claim, we would suggest, your Honor, what they've put into this four million dollars is [54] everything that they have spent, including many capital items, which are certainly not going to be worthless a

few months from now when the Second Circuit renders its decision.

So our suggestion is that we are prepared to post this, that with respect to BSCCI, the amount being two hundred and fifty thousand dollars.

Now, with respect to the town, our proposal there would be to, first of all, enter into an agreement, which Mr. Goldstein can explain to you in more detail, by which the plaintiff in this lawsuit and certain other carters who are presently serving the town, would continue to take trash to the local facility, as long as the tipping fee remains the same. They would continue to take as least as much trash to the local facility as they did last year.

And then in addition, that we would post a one hundred thousand dollars bond as an additional security.

We believe this is fair. We have talked with our clients. We are confident that we will be able to post a bond in the total amount of three hundred and fifty thousand dollars. We believe that is an appropriate amount.

THE COURT: Did you say three-fifty?

MS. CHRISTIAN: Three-fifty, yes, your Honor.

[55] If you would like more details concerning the agreement to continue hauling trash to the local facility, I would ask that Mr. Goldstein address that.

THE COURT: All right. Anyone else want to talk?

Mr. Goldstein.

MR. GOLDSTEIN: Good afternoon, your Honor. Arthur Goldstein.

Your Honor, I spoke—personally spoke to the five plaintiffs that are part of this case with regard to the continuity of the flow of waste that has been—that was delivered to the facility during the year 1994 and they are willing to maintain the same volumes that they had in the past year.

I also spoke personally with nine other carters using the facility and they told me they will maintain the same commitment.

My thought would be that the bond can be conditional upon review that in the event that flow is not maintained, that your Honor would rereview this number that you approved today and that would ensure the town that that amount of waste would still continue into the town facility.

MR. EISENBUD: Just a couple of points, your Honor.

[56] I know you have indicated that you must have some bond and I accept that. But if it need be I can cite a number of cases, including a Second Circuit case stating that you have the discretion to waive it altogether. So obviously if you have that discretion, you have the discretion to set a very nominal amount here and I can cite those cases.

THE COURT: I fully understand and I'm also fully cognizant of the fact that I can set no bond; that given all of the circumstances in this case, it wouldn't be very hard to persuade a Court of Appeals Judge that this was not a very prudent exercise of discretion on my part.

MR. EISENBUD: Your Honor—

THE COURT: They call it gross abuse of discretion.

I guess you've never been on the receiving end of the one of the kind of missiles from the Second Circuit when you enter a default against an attorney or three times, after three warnings you're going to default against him and you throw his case out. And they say that is a gross abuse of discretion, no matter how many times you've warned him.

MR. EISENBUD: Let me just look practically at the situation, Judge, and take BSCCI first, if I may.

[57] They talk about all these costs that they have incurred. They said they have already used up the two hundred and fifty thousand dollars in December when they mobilized before the contract went into effect.

I think that is clearly their problem. The contract wasn't in effect then. No one can be held responsible for their impetuous act.

THE COURT: It's not impetuous. They had signed a contract and they said they are going to start picking up garbage the first of the year. And this lawsuit, I am sure, came to some extent—I am not saying justifiably, but to some extent came out of the blue to them.

That didn't take a great deal of clairvoyance to have told them that it was coming. But some people are not—don't look ahead and don't plan ahead quite as fast as far as other people.

MR. EISENBUD: That is just not the case, Judge. They were present at every town board meeting that I was. I personally told the town board that if they took the action they were taking in a way they took it that they would be in violation of Carbone.

Others specifically threatened litigation and litigation was in fact filed prior to their signing the contract. There is no question that they knew what they were getting into.

[58] THE COURT: But there were also other commitments to pick up garbage.

MR. EISENBUD: The contract did not go into effect until January 2nd. They waited until December 23rd, when your Honor set a hearing for the 30th on a preliminary injunction and chose that week to start putting the containers out on property, with the knowledge that your Honor might hold everything in abeyance until the 30th.

All I am saying is that isn't going to be subject to our damages. We didn't cause those damages. They put them out and—

THE COURT: That is not their view. That's your view.

MR. EISENBUD: All right. Be that as it may—

THE COURT: When you were here, I suppose.

MR. EISENBUD: The important thing I think is that there are two possibilities here. One is that we will ultimately prevail. The—

THE COURT: And the other is that they will prevail.

MR. EISENBUD: But I want to look at BSSCI's potential damages in either scenario.

If we prevail, they will not be able to claim any damages for an unconstitutional contract. So they [59] will have no damages. Whatever they say their costs are, it's too bad. If it's an unconstitutional scheme, they cannot enforce the contract or claim damages.

On the other hand, if they win, the town has it within its power to make the effective date of the five-year contract the date that the litigation is over and give them the full five-year benefit of their contract. They won't be out the profits. They will be able to use all their machinery.

I don't think realistically all their claims of damage makes sense within the contract your Honor has before you, particularly being what I had argued several days ago, which is their whole goal is not to have a preliminary injunction because they win if they get their containers out there because they take over the whole town's business.

Win or lose ultimately the lawsuit, once they are there, they win. And that is really the goal.

They have taken a calculated risk here because they saw that as a great benefit. But that's their risk.

Secondly, your Honor, with regard to the town—

THE COURT: Wait a minute. If you win on appeal—

MR. EISENBUD: Yes.

THE COURT: BSSCI is not going to win.

[60] MR. EISENBUD: Your Honor, there may be—it may well be that where there are specific contracts that the carters will be able to get back into those customers' business, but otherwise, with BSSCI containers on the site, and assuming they are going to charge a reasonable fee and that they're providing good service, and I'm sure they will, the customers aren't going to care.

THE COURT: And then inertia is going to set in.

MR. EISENBUD: I think so, Judge. I think who picks up the garbage isn't a big issue as long as the price is right and it's done well. So once they're physically

present—so I think that's the risk that they knew they were taking because it's important for them to be able to get in and get those trucks first.

But looking at it from the town perspective, if plaintiffs win here, all the problems they are talking about, making up the short fall if the preliminary injunction goes into effect, they will be face with it anyway. At some point the taxpayers are going to have to pay town-wide debt going to solid waste. There is no question about that.

If the town wins and there is the short fall in the interim due to the preliminary injunction, the taxpayers are going to have to make up the short fall. It's [61] a town-wide obligation. They have short term borrowing mechanisms to make up for those things.

And that's the reality, Judge. The taxpayers are going to pay either way regardless of the outcome here. They won't be damaged. They just simply have to exercise the powers that they have to make up the short fall through the normal taxing measures the legislature has given to them.

THE COURT: Oh, I am fully cognizant of that. I'm a taxpayer, too, like everybody else.

MR. EISENBUD: But I think when they talk about a hundred cents on the dollar being damaged, it just isn't so. And of course I could get into other specifics, such as that they have voluntarily on January 3rd, done away with all of the ad valorem tax on—or the fifteen hundred dollar fee on parcels that were vacant. That's 2.2 million dollars out of the 18.9.

They haven't said how they are going to make up for that, but they did that voluntarily on January 3rd, so that brings that down. Once they do that, they take that out. That means they dump the benefit system. They dump the benefit system because otherwise it would have to be charged to every parcel within the district.

So whatever the fees are that they are charging, they aren't benefit assessments because by definition [62] they

have to be charged to everyone and they aren't doing that.

So I am not sure what their claims of damage are, but certainly ultimately it will be the taxpayers who will pay either way, but I don't see that they will be damaged in any meaningful sense.

So I ask you to set a very nominal bond.

And lastly, Judge, I think it's critical here, unless the defendants are willing to take your Honor's complied offer or suggestion that we stipulate to treat your ruling as a summary judgment decision, which of course we have the power to do, but if they don't, I'd ask you today to establish a schedule for them, for us to be able to file our motions for summary judgment and a short date for them to respond so that we can get the ruling on the merits from your Honor.

I think it's critical that we do that today so that we know where we're going. If they want to go up and challenge the preliminary injunction, let's know today when we will be able to make our motion for summary judgment.

Thank you.

THE COURT: Well, don't leave the podium with that last one.

A motion for summary judgment would mean that [63] you would all be entitled to put in new briefs, to the extent that you felt was warranted in the light of the—what I gave you. And I have no objection to doing that.

You might, if I handed down a motion for summary judgment, is what you're suggesting, in your favor, that would do away with the harm entirely.

MR. EISENBUD: Correct.

THE COURT: Yes.

MR. EISENBUD: We are certainly amenable to your suggestion that this be treated—your ruling be treated as a summary judgment, but not—

THE COURT: I didn't suggest it. I just said it might be available. I can't do it—I can't make it without giving them an opportunity to treat it as such.

MR. EISENBUD: I understand.

THE COURT: On what date would you like to serve your summary judgment papers?

MR. EISENBUD: By next Friday, your Honor?

THE COURT: No, no. I long ago learned not to ask when. That's why I use that precise language. On what date.

MR. EISENBUD: I am sorry, your Honor.

THE COURT: That means a date, because if you say by next Friday, I don't know what that means.

MR. EISENBUD: That would be the 10th of [64] February, Judge, next Friday.

THE COURT: Next Friday.

MR. EISENBUD: February 10th, your Honor.

THE COURT: All right. I will find out from them when he would like or whether they would like to answer.

MR. EISENBUD: Thank you.

MR. CORE: Your Honor, in response to the undertaking, I think Mr. Eisenbud made the points to the Court with regard to BSSCI better than I could.

Your Honor, he outlined the constitutional provision of this action. Judge, if this is declared unconstitutional and that a possibility may exist, our recourse against the town may be limited. Judge, that is exactly why we are requesting an undertaking.

All plaintiffs have talked about, the damage that BSSCI has incurred, the damage that the town has incurred, your Honor. Your Honor, plaintiffs have a big advantage here with the status quo. They continue to collect on their prior scheme of operation. They have continued to collect income for the last month, your Honor, and they shall continue, pending any appeal, to do that collection, getting those moneys. Those moneys, your Honor, are substantial.

I have outlined four million dollars and I think [65] I have outlined it prudently to the Court, your Honor. Your Honor, we negotiated the mobilization fee. My

people aren't, I Dream of Jeanie, your Honor. They can't just blink and five thousand containers magically appear at customer sites. It took about 45 days to put this scenario into motion. It took two weeks with crews almost around the clock to put out containers, your Honor.

So we were acting prudently and we were acting within the scope of our agreement to go and mobilize to get ready for the 1st.

THE COURT: In any event, at the moment, from what you tell me, you have taken all of that stuff back.

MR. CORE: Yes, your Honor, because of your Honor's order we have. And again, all this equipment has to be stored outside. There are steel containers that as we speak are rusted and weathered and are rotting. The trucks, your Honor, have been painted and designed and designated for the Town of Babylon.

I think that plaintiff is misplaced by saying, your Honor, that we can just go out. This was an entire town, your Honor. We can't just go out and market these containers and these trucks. This was service to an entire town. It's going to be very, very difficult to do that, your Honor. In fact, it was difficult to get the [66] equipment to begin with.

So I think your Honor has to set something for BSSCI to begin. While the plaintiffs now benefit from the status quo, the town and BSSCI, your Honor, are the only two entities now that are being damaged.

Your Honor, respectfully I request, and as I have articulated before the break, four million dollars is requested by the defendant BSSCI.

Thank you, your Honor.

MR. AMOROSO: Your Honor, Mr. Eisenbud talked about risk and the town going pell-mell into this situation, and I think that is an extremely unfair characterization.

THE COURT: All he said was they put you on notice. That's all.

Of course I wasn't there at the time and I don't know to what extent the—if the notice was causal or they addressed it. But regardless, by the time we roll around into September, we already had at least one lawsuit before me. I don't know how many other lawsuits are floating around the—

MR. AMOROSO: Well, your Honor, in addition to this Court, ten other judges have considered this statutory scheme.

THE COURT: In this—

[67] MR. AMOROSO: And have denied injunctive relief. Your Honor is the ony one out of the other ten that granted any injunctive relief.

And I think it's important to press the point that the town is the only one here representing the public interest.

THE COURT: Well, let me ask you—

MR. AMOROSO: The defendants—

THE COURT: You say this is the only one that granted injunctive relief. But I don't know what the other town ordinances look like. But I do know what the Carbone case says. And I—well, you go ahead and finish your comments.

MR. AMOROSO: Your Honor, the plaintiffs here and even the co-defendants BSSCI, they represent private interests. They represent private profit-making entities. The Town of Babylon is here on behalf of the taxpayers. We are the only ones representing the public interest. And when all is said and done, the taxpayers of Babylon are going to end up paying significant more regardless of which side ultimately wins. And I think it's important to emphasize that.

THE COURT: Well, you are not really looking at it from the—I think you're looking at it from an adversary —as an advocate.

[68] There was an offer made by your co-defendant about—at least attempting to take the town off the hook here and put them on a—what they would regard as a partial even keel with respect to this disposal unit.

Now, I am not going to suggest that you should take it or not take it. But you've got—as I see it, based on—if my interpretation is correct, you've got a real problem at the very minimum with respect to this disposal problem. And I don't see that you are thinking in terms of resolving that problem.

MR. AMOROSO: Well, your Honor, I think if we had had an opportunity to argue the motion to dismiss, that would become clearer because the concern that—

THE COURT: You will get that opportunity on the motion for summary judgment.

MR. AMOROSO: Well, your Honor, I think it's important to emphasize that the aspect that the Court focused on, the disposal aspect, is a 1985 contract.

THE COURT: I didn't focus on the disposal. I focused on the terms and conditions laid out in the Carbone case. And when I let you get the chance to read what I said, I think you will understand what I was trying to tell you.

MR. AMOROSO: Well, I think you stopped reading too soon, your Honor.

[69] THE COURT: I didn't stop reading. I read you the whole thing. I understand your point that you said I left out. I didn't leave it out. If you look carefully at what I said, you will see I covered that point, too.

But you don't seem to understand what—even in the language of the majority opinion, teaching of our cases. This is the way you should have done it.

Now, this is not something that came out of the blue. Before you even got around to amending the ordinance, I told you to read that portion of the opinion and you ignored it.

MR. AMOROSO: Well, your Honor, I respectfully—

THE COURT: I didn't say you ignored it, but your trustees or your—your councilmen, I guess they are, or village trustees. Councilmen and Supervisor ignored it. It won't be the first time that the Town of Babylon ignored words of wisdom. Go back and talk to Gilbert Hanse.

MR. AMOROSO: Well, your Honor, in this instance, the town was attempting to take into consideration all of the comments made by the Court. And when you look at the original ordinance and the amended ordinance, I'm at a loss to understand how we get where we are without pointing to specific portions of the ordinance.

[70] And I would emphasize that there are separability provisions in the ordinance. There are separability—

THE COURT: There may well be, but—

MR. AMOROSO: But to stop the town in its tracks where there is a presumption of constitutionality to disregard eighty-nine million dollars worth of bonds and to just say, well, the whole thing is wrong—

THE COURT: I am saying that as I read the opinion, the whole thing is wrong because I don't think they would have gone to the extent that they went without—they went well beyond the requirements of what they had to say, as far as the town function was concerned.

MR. AMOROSO: Well, I—

THE COURT: That's your problem.

MR. AMOROSO: Well, I don't believe it's a problem because I think when you look at that paragraph that I directed your attention to, the converse of what Judge Kennedy said there is true. That having gone to the open market, you can't discriminate. Once you don't go to the open market, there can be discrimination.

And he says, go by bond or general taxes. And that's what the town did.

THE COURT: General taxes means taxes leveled [71] across the board.

MR. AMOROSO: The residences are taxed and the commercial—

THE COURT: But the problem was that you put in this discount provision. You didn't stop. If you had done it by general bonds—not by improvement bonds, but general bonds and general taxes, and made this facility available to everybody, you might have walked out

of here without this kind of a problem. But you didn't stop there.

MR. AMOROSO: Well, we collected the money.

THE COURT: And that's what they said that you have to do if you're going to do it. And moreover, they added this word about teaching more cases.

When a court says that teaching is ignored, you do so at your risk.

MR. AMOROSO: Well, your Honor, I think that disregards the last 20 years of history and the eighty-nine million dollars that the town—

THE COURT: They don't care whether you spent eighty-nine million dollars or three hundred million dollars.

MR. AMOROSO: Well, again in the market participation case, they talk about that. And they say that the State of South Dakota invested money in building [72] a cement plant and they are allowed to protect their investment.

THE COURT: Go back and look at the history. They could have cared less. The Second Circuit could have cared less with respect to Roslyn. They eventually shut it down. And Lord knows how much money the—you know, good money that was blessed by the EPA and then two years later changed their mind and said it wasn't such a good idea.

MR. AMOROSO: I believe that was for environmental reasons. That hearing is currently going on.

THE COURT: This is for constitutional reasons. I think the Constitution may be stronger than the environmental reasons.

MR. AMOROSO: Well—

THE COURT: I don't say that I agree with this opinion. I've told you over and over again, were I deciding it myself it might not come out the same way, but I can't do anything about it.

MR. AMOROSO: Well, we believe that in the public interest the other judges that considered this issue have gone the other way.

THE COURT: Well, I don't know what their ordinance provides, but they certainly—I can't believe [73] they didn't read this case.

MR. AMOROSO: It was in this case, your Honor. This case involving this contract.

THE COURT: You're talking about Judge Tannenbaum.

MR. AMOROSO: Judge Tannenbaum, Judge Doyle, Judge Gerard.

THE COURT: Now, look, I read Judge Tannenbaum's decision very carefully. I am a great admirer of Judge Tannenbaum. But he didn't dismiss this question, nor did he concern the commerce clause with—as far as the—it wasn't presented to him. I am convinced of the—

MR. AMOROSO: Your Honor, if I may.

THE COURT: And the—

MR. AMOROSO: Judge Doyle decided on irreparable harm. Judge Tannenbaum decided the Carbone issue and said that it was likely that the defendants were going to succeed on that issue.

THE COURT: Well, not the way he had it presented here. I can tell you that.

MR. AMOROSO: Well, I would harken back to Judge Gerard when he dismissed the first attack on this. And he said that he believed that given what is entailed, that an undertaking in the millions would be appropriate.

We have presented to the Court a proffer of [74] evidence and Mr. Jacobs is here to put the evidence on the record, if the Court so desires, that the town is going to lose 7.3 million dollars in 1995. And we respectfully—

THE COURT: Well, seven or twenty-three million dollars if you get on your hobby horse and make a—like a B-line for the Second Circuit. You want to be able to get a motion on before Monday and maybe invalidate everything I've done.

MR. AMOROSO: Well, your Honor, that won't solve the problem because I believe that your determination with respect to irreparable harm is reversible error, and the Court may take that as very easy grounds to reverse. And we still come back here on the injunction issue.

THE COURT: Then we've got the summary judgment motion.

MR. AMOROSO: And the most to dismiss, I might add.

THE COURT: And the motion to dismiss.

MR. AMOROSO: But I would suggest, in terms of procedure, that a significant bond to both defendants totaling over eleven million dollars be entered with a short time period. And if the plaintiffs are unable to meet that time period, then we reconvene to meet the bond and satisfy the bond within that time period, and then we [75] reconvene to consider whether or not the preliminary injunction should be turned into a permanent injunction so that we can go up to the Second Circuit with a final order.

THE COURT: There is nothing to stop you from going to the Second Circuit tomorrow.

MR. AMOROSO: That's true, but I—with all due respect, I don't want to have to come back here. I would like to have a final order at some point so that we can end this limbo period that we are in and that we have been in. And ultimately, the issue needs to be decided and finalized.

THE COURT: Well, I know, but I am sure if you are willing to let them continue without a bond, they will be as happy as clams until we—

MR. AMOROSO: Well, I want the eleven million dollar bond and—

THE COURT: I am suggesting that we have a bond put up. And you can get opt to get the thing resolved on a permanent basis or you can go to the Second Circuit and try and get the injunction resolved.

MR. AMOROSO: Well, that is our position, your Honor, that we would like the bond set in the amount of 7.3 million dollars in favor of the town, and that they be given a short number of days to satisfy that, so that [76] we can reconvene and hopefully make this into a final order.

Thank you.

THE COURT: What date would you like to—they are proposing to serve an answer—I mean serve you with a motion for summary judgment on the—you said the 10th?

What date did you say?

MR. AMOROSO: Your Honor—

THE COURT: Wait. What date did you say you would serve them?

MR. EISENBUD: Friday, the 10th.

THE COURT: The 10th.

MR. AMOROSO: Your Honor, in the interest of conserving resources, what I would suggest is that we return on the 10th to argue the motions to dismiss and that we would be prepared, subject to my clearing this with the client, we would be prepared to stipulate to get a final order at that time.

THE COURT: I don't follow you.

MR. AMOROSO: Well, your Honor, I think I have made myself clear that an appeal of the existing order, even were we to prevail, doesn't get us out of the suit. If we are ultimately to prevail on the Carbone issue, it's going to have to be from a final order from this [77] Court.

And while I enjoy writing briefs and running my Xerox machine making copies, I think, given the Court's inclinations, we need to get to a final resolution. And I don't know that a briefing schedule would bring it about, given what the Court has said.

THE COURT: Well, in other words, would you be willing to stipulate now to a permanent injunction and do away with all the other—

MR. AMOROSO: Well, what I am suggesting is that the Court make its determination on the undertaking, that you set—

THE COURT: Don't you understand, if you stipulate to a permanent injunction, I don't to have set an undertaking.

MR. AMOROSO: Well, your Honor, I'm not the client. I need to resolve this with the town. And I believe that the town has to have all the information in front of it, including your Honor's determination on an undertaking.

It may be that my understanding and recommendation may be not followed, and that the town would say, yes, we are going to the Second Circuit. Or gee, they weren't able to meet the eleven million dollar bond. We are going out on the street and going to [78] collect garbage.

I can't make that judgment here today. But what I would like to do is to set the timetable so that by five days from when you set the undertaking, we will be back here either with an undertaking, at the which time the town has to make its decision or there would—

THE COURT: You are not posting an undertaking.

MR. AMOROSO: Excuse me, your Honor?

THE COURT: You are not posting an undertaking.

MR. AMOROSO: No, the plaintiffs.

THE COURT: You said, we will be back here with our undertaking. I thought that's what you said.

MR. AMOROSO: I mean we are such friends, we've grown to love each other.

THE COURT: Yes.

Well, if you're not going to give me a date I will give you a date. And I will say that any responsive papers for summary judgment motion that they propose to make, should be served and everything filed on the 17th, and I will hear you on the 24th.

That's as short as I can make it, as far as I can see.

MR. AMOROSO: Your Honor is rejecting my suggestion that the undertaking be—

THE COURT: Oh, I am going to require them put [79] up an undertaking before that.

MR. AMOROSO: Okay.

THE COURT: I am just setting up the summary judgment motions so you underestand the options. So you will have all your options, as they say.

MR. AMOROSO: And when will we be able to be heard on the motion to dismiss?

THE COURT: The 24th.

MR. AMOROSO: Well, your Honor, if I may, we were suppose to be heard on the motion to—

THE COURT: There will be motions and cross motions on the 24th. We will hear you then.

Your motion to dismiss at the moment is—I've resolved it. I'm not dismissing their complaint.

Otherwise I mean as a practical matter, unless you want to add something, which you could add on the 24th when you make the motion for summary judgment.

MR. AMOROSO: So our motion is put offer over to the 24th?

THE COURT: Yes. Well, I want to hear them both at the same time. They can answer your motion to dismiss at the same time.

MR. AMOROSO: Well, they have already answered, your Honor. So if you could make a direction that at least that briefing be over.

[80] THE COURT: All right.

MR. AMOROSO: Thank you.

THE COURT: I want to hear the motion for summary judgment. It's still in effect, the crosss motions, if you want to make the cross motions on the 24th.

Now, the—

MR. CORE: Your Honor, may I be heard?

BSSCI did not make any motion to dismiss, your Honor. If we so choose, your Honor, may we work under that same briefing schedule?

THE COURT: The cross motion for summary judgment if you want.

MR. CORE: Thank you, your Honor.

MS. CHRISTIAN: Just briefly, your Honor. First of all, let me clarify, are these to be cross motions for summary judgment on February 10th?

THE COURT: Well, he hasn't said that he's going to make a cross motion. He's going to stand on his motion to dismiss.

MS. CHRISTIAN: If he has not then, your Honor, might I request—

THE COURT: BSSCI may make a motion to dismiss.

MS. CHRISTIAN: That's right.

And will the dates for their motion for summary [81] judgment and the motion to dismiss be on February 10th?

THE COURT: The 10th.

MS. CHRISTIAN: All right. Then I assume we may respond on the 17th.

THE COURT: That's right.

MS. CHRISTIAN: Very good.

We want to add one other thing, your Honor, on the response to the statement that no other courts had issued a preliminary injunction with respect to flow control.

I am aware of at least two that were issued within two weeks after the Carbone decision. That was the Mid-America case by the Northern District of Ohio. And a case in Boston. And I apologize. The Barnstable case in Massachusetts.

I just want to reassure your Honor that you are not alone.

With respect to the undertaking, I would reiterate that—

THE COURT: Well, I am not alone. I know I told the Smithtown people that I was going to follow the Carbone case. That case is a lot clearer than yours, I'll grant you, but—

MS. CHRISTIAN: There are lots of others, Judge.

THE COURT: They are up to the Second Circuit on [82] that very question right now.

MS. CHRISTIAN: The only other thing I would add is with respect to the undertaking. We have not heard anything that in my view justifies any higher undertaking that was proposed.

THE COURT: Well, I think the—of course they are asking for—this was an annual undertaking in some ways. And I am very sympathetic to their view that the damages are running rather heavily.

I'm inclined to think that I—I have no way of knowing how long this is going to play out. I am inclined to think that I have to impose a fairly substantial undertaking. Probably it may be more than is to your liking, but I will give you to Monday to see if you can post it.

I'm thinking with respect to BSSCI that's got to be at least five hundred thousand dollars. And I think that the undertaking with respect to the town has to be at least a million.

MS. CHRISTIAN: We will draw that to post it, your Honor.

THE COURT: I think that those are the bare minimums. And I think both of you have to make maybe claims with—I think both of you may be dissatisfied and may have to get papers in the Court of Appeals, and [83] you have may be right.

I think that is what would be—what I would think in my best judgment.

MS. CHRISTIAN: Thank you, your Honor.

I have been advised, your Honor, could we request until Tuesday to get back to you with respect to the bond. I am advised by my client that they will need until Tuesday rather than Monday.

THE COURT: Well, I will give you until Tuesday to post them, but it's got to be retroactive to today.

MS. CHRISTIAN: That will be fine.

And in addition, your Honor, we would respectfully request, if possible, would it be possible to post half of that amount immediately for the first six months? In other words, make it—

THE COURT: No. I think the town has got to be assured of that minimum protection.

MS. CHRISTIAN: Thank you.

THE COURT: Now he thinks it's grossly inadequate, but at the same time it behooves him to move as expeditiously as possible.

There is nothing to prevent him from vacating this whole thing if the Court of Appeals disagrees with me

that it's as clear-cut as I say. They may say, look, the judge found there is no irreparable harm. There is [84] no basis for this injunction. Resolve the whole thing.

I have no—believe me, I have come very close to deciding this summary judgment motion without having—in violation of the United States against Blassingame, if I can put it that way.

But I think I have cut the thing down to what I think is appropriate. I think the town did not heed the warnings and the teachings of the Carbone case. I may be wrong.

MS. CHRISTIAN: Thank you, your Honor.

MR. CORE: Your Honor, may I just make one comment?

Your Honor, I won't comment about your Honor's posting of the hundred—the one mililon five hundred thousand in total.

Your Honor, but just can I ask, can we make that retroactive to your Honor's status quo decision of December 30, 1994?

Your Honor, the amount, we have argued, your Honor, that it's grossly inadequate. Can we please have it at least, your Honor, retroactive to that day when you made the first status quo determination?

I believe that's cutting the baby in half, your Honor.

MR. EISENBUD: Your Honor, I have a real problem [85] with that. They made the decision to pull all their containers back after having made the decision to put them on. They made the decision. They pulled the containers back. If they hadn't put them there in the first place before the contract was started they wouldn't have had this problem.

But they are trying to make this retroactive to a date where they basically made the damages to themselves and we don't think that is appropriate.

MS. CHRISTIAN: Your Honor, I also have a similar view as to whether or not that is something that is practical that could be bonded.

THE COURT: I do, too. I have a real problem with respect to it. I don't know what bonding company will do it.

MR. CORE: Your Honor, I believe in this matter plaintiffs will have to make those arrangements adequate to the undertaking.

THE COURT: I mean I can see a bonding company doing it from the date of this decision, but I am not so sure that we had enough in front of us.

The ordinance was amended between now and then, if you remember right.

MR. CORE: Yes, your Honor. And I so recall your status quo order from the bench on—

[86] THE COURT: I know, but I did it in part because at the time that I made it, the town said they were willing to amend the ordinance. You've got to go back to the—I am having a hard enough time to—I can't remember anything anymore, but I do remember, when you all came in here on the 31st, the town said that they were going to amend the ordinance.

And I said, under the circumstances, I think you better maintain the status quo. It was a different ball game than the one we are addressing now.

MR. CORE: Thank you, your Honor.

MR. AMOROSO: Your Honor, just a point of clarification.

THE COURT: Am I not correct on that? Didn't you tell me they were going to amend their ordinance and didn't they go into session, and, indeed, they were going to amend it on the 25th, and you advanced the date without having anybody hear it. Technically, this was all going to be done on the 25th and you were going to come in here today, I think, to resolve what we do on the 25th.

MR. AMOROSO: We accelerated it and came in on the 10th.

THE COURT: I think that's right.

MR. AMOROSO: That's right.

[87] THE COURT: Because what I said this morning was the—or earlier today, we only had literally a week to deal with this problem. That's about right.

MR. AMOROSO: We worked extremely long and hard, your Honor.

The point of clarification I would like to make is that the bond is a collective bond from the plaintiffs in both cases in favor of the town and BSSCI in the amounts that you indicated.

Is that a fair—

THE COURT: Well, it was presented to me that I should bond each of you separately, and I bonded the—I bonded in favor of the town on a million bond, and in favor of BSSCI in five hundred thousand.

MR. AMOROSO: Well, my point is that there are two cases. We will be happy to have a million from each of the plaintiffs and each of the—

THE COURT: No. I mean this was done for both cases.

MR. AMOROSO: That's the clarification I wanted. Thank you.

THE COURT: Anything else we have to do?

Let me know what you're going to do. Don't pull more surprises on me, if you decided last week to do [88] something else.

Okay?

MR. AMOROSO: Yes, your Honor. Thank you.

MR. CORE: Thank you, your Honor.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the First day of November one thousand nine hundred and ninety-five.

Dkt No: 95-7131

A. A. & M. CARTING,
Plaintiffs-Appellees,

v

TOWN OF BABYLON, NY,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellees A. A. & M. Carting,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

APPENDIX D

COMMERCIAL WASTE COLLECTION AND RECYCLING SERVICE AGREEMENT

between

THE TOWN OF BABYLON
ON BEHALF OF THE TOWN OF BABYLON
COMMERCIAL GARBAGE DISTRICT NO. 2

and

BABYLON SOURCE SEPARATION
COMMERCIAL, INC.

* * * *

ARTICLE 2

SCOPE OF SERVICES

2.1 *General Conditions*

* * * *

It is the intent of this Agreement to grant exclusive Collection services of CII Refuse within the District. To effectuate this intent the Town will issue only one license to provide Collection services of CII Refuse to Eligible Parcels within the Town of Babylon Garbage District No. 2. The Contractor under this Agreement shall be entitled to be the holder of this license so long as the Agreement remains in effect.

* * * *

2.2.7 *Disposal*

Contractor may deliver CII Refuse collected by dedicated Collection Vehicles from Eligible Customers to the Town Resource Recovery Facility or such other Disposal Site that the Town may direct. Alternatively, Contractor

may deliver CII Refuse collected from Eligible Customers to an alternate Disposal Site for disposal at its own cost. During the first year of the term of this Agreement, Contractor shall have the right to dispose of 96,000 tons of CII Refuse at the Town Resource Recovery Facility at no charge to the Contractor. During the second and subsequent years of this agreement, Contractor shall have the right to dispose of 96,000 tons or CII Refuse as adjusted by the Adjustment Factor.

* * * *

ARTICLE 18

RIGHT TO DESIGNATE THE DISPOSAL SITE FOR WASTE

The Town shall retain the right to direct the Contractor to dispose of the waste collected pursuant to this Agreement to any Disposal Site or Materials Processing Facility. In the event that the Town chooses to change the location of such disposal, the Contractor and the Town shall in good faith negotiate a new rate for affected services, based on the difference in the transportation costs to the new Town-designated Disposal Site or Materials Processing Facility. The Town will pay the disposal fee. Should the Town and the Contractor be unable to agree upon the transportation costs when and if the Town designates a new Disposal Site or Materials Processing Facility, the ton-mile rates agreed to by the Contractor and the Town in Section 2.3.5 of this Agreement shall be in effect, and either party shall have the right to seek an alternative amount through the dispute resolution process of Article 14.

* * * *

APPENDIX E

RELEVANT PROVISIONS FROM THE CODE OF THE TOWN OF BABYLON, CHAPTER 133

§ 133-10. Proper vehicle and license required for collection.

No person, except as hereinafter provided, shall remove any solid waste, offal, garbage, refuse, recyclable material, construction and demolition debris, ashes or rubbish of any kind from the premises of any person, firm or corporation or cart or transport the same through or upon any street, avenue, parkway or highway within the Town except in trucks or wagons which shall meet all statutory and contract requirements, if applicable, of the Town and unless such person shall have first obtained a license from the Town Clerk as hereinafter provided, but no such license shall be required for persons under contract with the Town who, pursuant to such contract, are transporting solid waste from a location outside the Town to the recycling facility or the Babylon resource recovery facility or transporting solid waste or recyclable material from the recycling facility to a location outside the Town.

§ 133-11. Exceptions to license requirements.

* * * *

B. Certain business wastes.

* * * *

(3) In exceptional circumstances a generator of waste may seek a special exemption from the Town Board or its designee on a case by case basis to haul its own waste material.

* * * *

§ 133-14. License classifications and fees.

* * * *

B. A Class 2 license shall be required of all persons engaged in the collection and transportation of garbage, refuse, solid waste and recyclable material within an improvement area authorized pursuant to a contract with the Town to collect and transport solid waste, garbage, refuse or recyclable material. The annual fee for such license shall be Five Hundred ($500.) Dollars, plus Fifty ($50.) dollars for each truck, wagon or conveyance used by the licensee in such collection and transportation.

* * * *

§ 133-37. Use of unlicensed private collectors.

A. It shall be unlawful for any person to enter into any agreement or arrangement, whether a fee is paid therefor or not, whereby a person not licensed by the Commission pursuant to this Chapter, removes solid waste, rubbish or debris, recyclable material, or construction and demolition debris within the Town.

* * * *